RECORD AND BRIEF

Supreme Court, U.S.
FILED
SEP - 8 2016
OFFICE OF THE CL

16-300

No.

In the Supreme Court of the United States

ERNST & YOUNG LLP AND ERNST & YOUNG U.S. LLP,
PETITIONERS

v.

STEPHEN MORRIS AND KELLY MCDANIEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

CORPORATE DISCLOSURE STATEMENT

Petitioners Ernst & Young LLP and Ernst & Young U.S. LLP are limited liability partnerships. They have no parent corporations, and no publicly held companies own 10% or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Ernst & Young LLP and Ernst & Young U.S. LLP respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is not yet reported. The order of the district court granting petitioner's motion to compel arbitration (App., *infra*, 43a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]

STATEMENT

This case presents a recognized and indisputably important circuit conflict concerning the interplay between two federal statutes. Under the Federal Arbitration Act (FAA), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 7 of the National Labor Relations Act (NLRA) provides that "[e]mployees shall have the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. And under Section 8(a) of the NLRA, it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. 29 U.S.C. 158(a). The question presented is whether the foregoing provisions of the NLRA prohibit the enforcement under the FAA of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

Respondents in this case are two of petitioners' former employees. Each signed an employment agreement that included an arbitration provision requiring all disputes with petitioners to be resolved in individual, rather than collective, arbitration. Respondents nevertheless filed a class-action lawsuit against petitioners in federal court. Petitioners moved to compel arbitration, and the district court granted the motion, holding that the arbitration provision was enforceable.

A divided panel of the Ninth Circuit reversed. Over a lengthy dissent, the majority held that the arbitration provision violated the collective-bargaining provisions of the NLRA and was thus unenforceable under the FAA. In so holding, the Ninth Circuit expressly disagreed with the prior decisions of three other courts of appeals—

including a decision of the Second Circuit that, in another case against petitioners, upheld the identical arbitration provision at issue here. The Ninth Circuit acknowledged that it was joining the minority side of a clear circuit conflict on the question presented. And petitioners are uniquely affected by that conflict, as a major employer that has been party to decisions on both sides. Because this case is the optimal vehicle for resolving the circuit conflict, the petition for a writ of certiorari should be granted.

A. Background

1. The Federal Arbitration Act guarantees that "[a] written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. As this Court has repeatedly recognized, the FAA reflects "both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal quotation marks and citations omitted).

Consistent with that understanding, courts must "rigorously enforce arbitration agreements according to their terms." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted). That is true in the context of agreements requiring disputes to be resolved in individual arbitration. See *Concepcion*, 563 U.S. at 345-352. And it is true in the context of agreements to arbitrate claims under federal statutory schemes, unless "the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit Corp.* v. *Green-*

wood, 132 S. Ct. 665, 669 (2012) (internal quotation marks and citations omitted).

2. Section 7 of the NLRA gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Under Section 8(a) of the NLRA, it is "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in Section 7. 29 U.S.C. 158(a). The question presented in this case is whether those provisions supply the requisite congressional command to render unenforceable an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

B. Facts and Procedural History

1. Petitioners are Ernst & Young LLP and Ernst & Young U.S. LLP (collectively "EY"). Ernst & Young LLP is an accounting firm serving clients in the United States; Ernst & Young U.S. LLP is an affiliate of Ernst & Young LLP. Virtually all of EY's approximately 40,000 employees in the United States have signed an arbitration provision as a condition of employment. That provision specifies that "[a]ll claims, controversies or other disputes between [petitioners] and an [e]mployee that could otherwise be resolved by a court" will instead be resolved through a program of alternative dispute resolution known as the Common Ground Dispute Resolution Program. App., *infra*, 44a. Under the program, "[c]overed [d]isputes pertaining to different [e]mployees will be heard in separate proceedings"; class or collective proceedings are not permitted. *Ibid.*

Respondents Stephen Morris and Kelly McDaniel began working in EY's audit division in 2005 and 2008, respectively. See App., *infra*, 45a. Both respondents agreed to be bound by the arbitration provision. See *ibid.*

2. In 2012, respondent Morris brought suit against petitioners in the United States District Court for the Southern District of New York on behalf of a class of California employees, alleging that petitioners had misclassified the employees for purposes of overtime pay under the Fair Labor Standards Act (FLSA) and California law. Respondent McDaniel later joined the lawsuit as a plaintiff. After the case was transferred to the Northern District of California, petitioners moved to compel arbitration. Respondents did not dispute that their claims were covered by the arbitration provision; as is relevant here, they argued that the collective-bargaining provisions of the NLRA conferred a nonwaivable right to collective litigation that rendered the arbitration provision unenforceable.

The district court granted petitioners' motion to compel arbitration and dismissed the case. App., *infra*, 43a-67a. As is relevant here, the court reasoned that it was required to "enforce the instant agreement according to its terms" "[b]ecause Congress did not expressly provide [in the NLRA] that it was overriding any provision in the FAA," which embodies a "strong policy choice in favor of enforcing arbitration agreements." *Id.* at 66a-67a (internal quotation marks and citation omitted; alterations in original).

3. A divided panel of the court of appeals reversed and remanded. App., *infra*, 1a-42a.

a. The court of appeals began its analysis not with the FAA, but with the NLRA. App., *infra*, 3a-11a. Citing case law construing Section 7 of the NLRA, the court

contended that Section 7 "protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums." *Id.* at 7a (internal quotation marks and citation omitted). According to the court, Section 7 thus establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." *Id.* at 8a, 10a. Petitioners' arbitration provision, the court of appeals determined, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." *Id.* at 11a. As a result, the court reasoned, the provision "interferes with a protected [Section] 7 right in violation of [Section] 8" of the NLRA and "cannot be enforced." *Ibid.*

The court of appeals then dismissed the FAA, stating that it "does not dictate a contrary result." App., *infra*, 12a. In the court's view, "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum." *Id.* at 13a. Rather, "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*." *Id.* at 23a. Relying on the FAA's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. 2, the court concluded that petitioners' arbitration provision was prohibited by the NLRA and thus unenforceable. App., *infra*, 16a, 24a.

In reaching that conclusion, the court of appeals "recognize[d] that our sister [c]ircuits are divided on this question," and acknowledged that the majority of the courts of appeals to have considered the issue had reached a contrary conclusion. App., *infra*, 24a n.16. The court of appeals specifically rejected the mode of analysis underlying those courts' contrary conclusion,

which would require a "contrary congressional command" in a federal statute in order to override the FAA's mandate to enforce arbitration agreements. *Id.* at 17a.

b. Judge Ikuta dissented. App., *infra*, 25a-42a. She contended that the majority had adopted reasoning "directly contrary" to this Court's arbitration jurisprudence and had "join[ed] the wrong side of a circuit split." *Id.* at 25a.

Judge Ikuta began by observing that, "[c]ontrary to the majority's focus on whether the NLRA confers 'substantive rights,' in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA." App., *infra*, 29a (citing *Italian Colors*, 133 S. Ct. at 2309; *CompuCredit*, 132 S. Ct. at 669; and *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). Under that test, Judge Ikuta reasoned, the NLRA contained nothing "remotely close" to a "contrary congressional command" that would trump the FAA. *Id.* at 35a. The collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively." *Ibid.* Nor do those provisions "expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively." *Id.* at 36a. Judge Ikuta likewise found no support in the NLRA's legislative history or underlying purposes for the conclusion that the NLRA precludes enforcement of an agreement requiring disputes to be resolved in individual arbitration. See *id.* at 38a.

Judge Ikuta proceeded to reject the majority's reliance on the FAA's saving clause. See App., *infra*, 38a-41a. At the outset, Judge Ikuta noted that this Court

"does not apply the saving clause to federal statutes"; instead, unless the supposedly conflicting statute contains a congressional command contrary to the use of arbitration, it "can be harmonized with the FAA." *Id.* at 39a. She contended that the majority's reasoning was based on the erroneous premise that collective-action waivers are illegal, when, in reality, such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." *Id.* at 40a. Judge Ikuta further reasoned that, even if the FAA's saving clause were applicable to federal statutes, it could not save the majority's construction of the NLRA as "giving employees a substantive, nonwaivable right to classwide actions." *Ibid.* As she explained, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Ibid.* (quoting *Concepcion*, 563 U.S. at 344). In *Concepcion*, she added, the Court "expressly rejected" the reasoning behind the majority's conclusion that "the nonwaivable right to class-wide procedures [that the majority] has discerned in [Section] 7" complies with the FAA simply because it "applies equally to arbitration and litigation." *Ibid.*

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the FAA." App., *infra*, 40a. She noted that "lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provided for by agreement." *Id.* at 40a-41a (citation omitted). As a result, "the employee's purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated" rather than arbitrated. *Id.* at 41a. The ma-

jority, in other words, "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a straightforward conflict among the courts of appeals on an important and frequently recurring question involving the interplay between two federal statutes. In the decision below, the Ninth Circuit expressly recognized that it was deepening an existing conflict on the question whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis—an agreement that would otherwise plainly be enforceable under the Federal Arbitration Act. Five circuits have now decided the question. Three circuits have held that such agreements must be enforced pursuant to the FAA and that they do not violate the NLRA. Two circuits, including the Ninth Circuit in the decision below, have held that such agreements violate the NLRA and are thus unenforceable under the FAA.

That conflict necessitates the Court's review, and this case is the optimal vehicle in which to resolve it. The question presented is of substantial legal and practical importance. Its resolution will determine whether an enormous number of employment disputes are litigated in the federal and state courts. This case cleanly and squarely presents the question, and the parties to this case, as an employer and its employees, will be acutely affected by the outcome. Petitioners' interest is particularly strong because they employ tens of thousands of people nationwide who are subject to the arbitration provision at issue; remarkably, there is a circuit conflict

over the enforceability of that very provision, with the Second and Ninth Circuits reaching different results in cases involving EY. And uniquely among the decisions in the circuit conflict, the opinions below fully develop the arguments on both sides of the question. Because this case readily satisfies the criteria for certiorari and is the optimal vehicle for the Court's review, the petition for a writ of certiorari should be granted.

A. The Decision Below Deepens A Conflict Among The Courts Of Appeals

The Ninth Circuit's decision deepens a conflict among the courts of appeals concerning the enforceability of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. In the decision below, the Ninth Circuit expressly recognized that conflict. See App., *infra*, 24a n.16. Other courts of appeals have done the same, see *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147, 1155, 1157-1159 (7th Cir. 2016); *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2 (2d Cir. Sept. 2, 2016) (summary order), as have legal commentators, see, *e.g.*, Jack S. Gearan, *Ninth Circuit Court of Appeals Widens Circuit Split as to Class Action Waivers in Employee Arbitration Agreements*, Nat'l L. Rev. (Sept. 1, 2016) <tinyurl.com/gearanarticle>. The circuit conflict plainly warrants resolution by this Court.

1. As the Ninth Circuit correctly noted, see App., *infra*, 24a n.16, three courts of appeals have held that an agreement requiring an employee to arbitrate claims against an employer on an individual basis is enforceable under the FAA and does not violate the NLRA.

In the earliest of the cited decisions, *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), an employee sued her former employer under the Fair Labor Stand-

ards Act on behalf of herself and a class of similarly situated employees. See *id.* at 1051. The Eighth Circuit held that the employer's arbitration agreement must be enforced and the suit dismissed. See *id.* at 1055. The Eighth Circuit began from the premise that courts are required to "enforce arbitration agreements according to their terms," unless there is a "contrary congressional command for another statute to override the FAA's mandate." *Id.* at 1052 (internal quotation marks and citation omitted). Because neither the NLRA nor the FLSA contained such a command, the Eighth Circuit concluded that the arbitration agreement at issue was enforceable. *Id.* at 1053-1055; see *Cellular Sales of Missouri, LLC* v. *NLRB*, 824 F.3d 772, 776 (8th Cir. 2016) (holding, "in accordance with *Owen*," that an employer did not violate the NLRA by "requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment-related disputes").

The Second Circuit reached the same conclusion in *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290 (2013) (per curiam). There, as here, the plaintiff worked for EY and, pursuant to the same Common Ground Dispute Resolution Program at issue here, agreed to resolve all disputes with EY via individual arbitration. See *id.* at 293-294. After the plaintiff filed a class action in federal court, EY moved to compel arbitration. See *id.* at 294. The district court denied the motion, but the Second Circuit reversed. See *id.* at 299. Like the Eighth Circuit in *Owen*, the Second Circuit began from the premise that "arbitration agreements should be enforced according to their terms unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* at 295 (internal quotation marks and citation omitted). The court found no such contrary command in either the

NLRA or the FLSA, and thus enforced the arbitration agreement as written. *Id.* at 297 n.8, 298-299; see *Patterson*, 2016 WL 4598542, at *3 (following *Sutherland*).

Finally, the Fifth Circuit followed suit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (2013). Unlike *Owen* and *Sutherland*, that case arose not from an appeal in a class action by an employee, but rather on a petition for review of a decision by the National Labor Relations Board (NLRB) on a charge of unfair labor practices. See *id.* at 355. The NLRB had ruled that, by "requiring employees to refrain from collective or class claims," an arbitration agreement "infringed on the substantive rights protected by Section 7 [of the NLRA]" and therefore gave rise to a violation of Section 8(a)(1). *Ibid.* The Fifth Circuit granted the petition for review. See *id.* at 364. The court reasoned that arbitration agreements "must be enforced according to their terms," and neither the FAA's saving clause nor "another statute's contrary congressional command" precluded enforcement. *Id.* at 358. As to the saving clause, the Fifth Circuit explained that this Court's decision in *Concepcion* "leads to the conclusion that the Board's rule does not fit" within the clause. *Id.* at 359. And the court did not find a "contrary congressional command" or inherent conflict with the FAA in the text, legislative history, or purposes of the NLRA. *Id.* at 360-361. Judge Graves dissented in relevant part, arguing that the agreement was unenforceable because Section 7 conferred a substantive right to engage in class or collective actions. *Id.* at 364-365; see *Murphy Oil, U.S.A., Inc.* v. *NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015) (applying the rule of *D.R. Horton* without "repeat[ing] its analysis").

2. Before the Ninth Circuit's decision in this case, only the Seventh Circuit had adopted a contrary interpretation. In *Lewis* v. *Epic Systems Corp.*, 823 F.3d 1147

(2016), petition for cert. pending, No. 16-285 (filed Sept. 3, 2016), the Seventh Circuit held that an agreement requiring an employee to arbitrate claims against an employer on an individual basis violated the NLRA and was thus unenforceable under the FAA. See *id.* at 1161. Like the Ninth Circuit here, the Seventh Circuit started with the contention that Section 7 of the NLRA gives employees the right to pursue "concerted activities," which it construed to include the "filing a collective or class action suit." *Id.* at 1152. The Seventh Circuit reasoned that the arbitration agreement "impinges on 'Section 7 rights'" by preventing employees from "tak[ing] advantage of any collective procedures" otherwise available. *Id.* at 1155. The Seventh Circuit then proceeded to consider the FAA, concluding that the FAA did not conflict with the NLRA because "the provision at issue is unlawful under Section 7" and thus "meets the criteria of the FAA's saving clause for nonenforcement." *Id.* at 1157.

Unlike the Ninth Circuit's decision here, the Seventh Circuit's decision was unanimous. And while the Seventh Circuit recognized that it was creating a circuit conflict, it summarily rejected the Fifth Circuit's reasoning and dismissed the Second and Eighth Circuits' opinions altogether, asserting that they had not "engaged substantively with the relevant arguments." 823 F.3d at 1159.

Particularly in the wake of the Ninth Circuit's decision in this case, there can be no doubt that there is a substantial circuit conflict that is ripe for the Court's resolution. Further review is therefore warranted.

B. The Decision Below Was Incorrect

Further review is also warranted because the decision below was incorrect. The majority below followed the wrong mode of analysis, which unsurprisingly led it to the wrong result.

1. As this Court has repeatedly stated, the FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). Consistent with that policy, the Court has held, across a variety of contexts, that arbitration agreements must be enforced according to their terms. See, *e.g.*, *Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 563 U.S. at 339; *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220, 225-227, 238-242 (1987).

The foregoing principle applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 132 S. Ct. at 669 (internal quotation marks and citation omitted). The party challenging the arbitration agreement has the burden of showing that "Congress intended to preclude a waiver of the judicial forum." *Gilmer*, 500 U.S. at 26. Indicia of such an intention "will be discoverable in the text of the [statute], its legislative history, or an inherent conflict between arbitration and the [statute's] underlying purposes." *Ibid.* (internal quotation marks omitted). Regardless of the source, however, Congress must demonstrate its intent to supersede the FAA with "clarity." *CompuCredit*, 132 S. Ct. at 672. And as is generally the case, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

2. The Ninth Circuit erred at the outset by refusing to follow this Court's mode of analysis and evaluate

whether the NLRA supplies a "contrary congressional command" overriding the FAA's instruction to enforce arbitration agreements according to their terms. App., *infra*, 17a. If it had done so, it would have found that the NLRA contains no congressional command contrary to collective-action waivers. See *id.* at 34a-38a (Ikuta, J., dissenting).

To begin with, the collective-bargaining provisions of the NLRA "neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively." App., *infra*, 35a (Ikuta, J., dissenting). While Section 7 gives employees the right to "engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. 157, it contains no "command" concerning arbitration, much less the kind of "express contrary congressional command" that this Court has indicated would unseat the FAA's presumption that arbitration agreements should be enforced according to their terms. App., *infra*, 29a-31a (Ikuta, J., dissenting) (internal quotation marks and citation omitted).

As Judge Ikuta noted in her dissenting opinion, this Court has found that much clearer statutory language still lacked the kind of clear congressional command necessary to nullify an arbitration agreement. See App., *infra*, 29a-33a. For example, in *CompuCredit*, the Court considered language in the Credit Repair Organizations Act (CROA) that plaintiffs argued precluded consumers from entering an arbitration agreement that waived their right to litigate in a judicial forum. See 132 S. Ct. at 669. The plaintiffs cited language in the CROA that required businesses to tell consumers that "[y]ou have a right to sue," 15 U.S.C. 1679c(a), and that provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer" was void and could

"not be enforced by any Federal or State court," 15 U.S.C. 1679f(a). See 132 S. Ct. at 669. Despite that language, the Court held that Congress did not intend to prevent arbitration of claims under CROA. See *id.* at 672-673. If Congress had so intended, "it would have done so in a manner less obtuse than what respondents suggest." *Id.* at 672. The Court gave examples of what sufficiently clear congressional commands look like:

> "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."
>
> "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy."

Ibid. (quoting 7 U.S.C. 26(n)(2) and 15 U.S.C. 1226(a)(2)). Nothing in the language of the NLRA establishes congressional intent with remotely similar clarity.

The NLRA's legislative history similarly lacks any indication of a congressional command precluding courts from enforcing collective-action waivers according to their terms. Notably, in enacting the NLRA, "Congress did not discuss the right to file class or consolidated claims against employers"; as a result, "the legislative history also does not provide a basis for a congressional command to override the FAA." App., *infra*, 37a (Ikuta, J., dissenting) (citation omitted).

Nor is there any conflict between collective-action waivers and the NLRA's underlying purposes. See App., *infra*, 37a (Ikuta, J., dissenting). The NLRA may give

employees a right to bargain collectively, but "nothing in the NLRA suggests that this protection includes the right to resolve disputes using a particular legal procedure." *Ibid.* In short, because the NLRA does not contain the requisite "contrary congressional command," the Ninth Circuit should have enforced petitioners' arbitration agreement according to its terms. *CompuCredit*, 132 S. Ct. at 669.

3. The majority below used a different mode of analysis to reach a contrary conclusion. It first concluded that the NLRA gives employees a substantive right to pursue legal claims collectively. See App., *infra*, 3a-11a. It then considered whether the right it found in the NLRA could be reconciled with the FAA and concluded that it could based on the FAA's saving clause, which provides that an arbitration agreement may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2; see App., *infra*, 14a, 17a. The majority reasoned that, because the NLRA confers a substantive right to engage in collective litigation, a contract purporting to waive that right would be illegal and thus invalid under the FAA's saving clause. See *id.* at 15a-18a.

The majority's mode of analysis simply cannot be reconciled with this Court's arbitration jurisprudence. The majority expressly declined to search for a "contrary congressional command" and ignored the presumption in favor of arbitration by attempting to reconcile the NLRA and the FAA on an equal footing. See App., *infra*, 17a. But this Court's arbitration decisions require a different approach. See App., *infra*, 29a (Ikuta, J., dissenting). If the majority's approach were correct, the FAA would yield any time an arbitration agreement could conflict with another federal statute. See *id.* at 39a-40a.

The majority's understanding of the FAA's saving clause is also inconsistent with this Court's decision in *Concepcion*. There, the Court explained that, "when a doctrine normally thought to be generally applicable * * * [is] applied in a fashion that disfavors or interferes with arbitration," it does not trigger the saving clause. *Concepcion*, 563 U.S. at 341. The Court determined that a defense that precludes the waiver of class or collective arbitration is not generally applicable because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. In the same way, the majority's approach here effectively "condition[s] enforcement of arbitration on the availability of class procedure," *Italian Colors*, 133 S. Ct. at 2312, and thus cannot be squared with *Concepcion*. In rejecting the reasoning of *Concepcion* and this Court's other arbitration decisions, the majority erred and "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." App., *infra*, 41a (Ikuta, J., dissenting).

C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

1. This case presents a critical question with significant ramifications for employers and employees alike. The use of arbitration in employment agreements is widespread—and for good reason. Arbitration allows the parties to design their own "efficient, streamlined procedures tailored to the type of dispute" at issue. *Concepcion*, 563 U.S. at 344. It provides "expeditious results." *Preston* v. *Ferrer*, 552 U.S. 346, 357-359 (2008). And it "reduc[es] the cost" of resolving disputes. *Concepcion*, 563 U.S. at 345. Accordingly, as the NLRB has recognized, "employers and employees alike may derive

significant advantages from arbitrating claims": "employers have a legitimate interest in controlling litigation costs, and employees too can benefit from the relative simplicity and informality of resolving claims before arbitrators." NLRB General Counsel Memo. No. 10-06 (June 16, 2010).

The Ninth Circuit's approach "effectively cripples the ability of employers and employees to enter into" these salutary agreements. App., *infra*, 27a (Ikuta, J., dissenting). A ban on the enforcement of agreements such as the one at issue here will not lead to more collective *arbitration*, unless employers expressly agree to allow it. See *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 685-687 (2010). And that is unlikely, because "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Concepcion*, 563 U.S. at 348. Nor are plaintiffs' attorneys likely to "arbitrate on behalf of individuals when they can represent a class" in federal or state court. App., *infra*, 40a (Ikuta, J. dissenting). The result, as Judge Ikuta explained in her dissenting opinion, is that "a broad swath of workplace claims will be litigated" instead of arbitrated as the parties agreed. *Id.* at 41a. That outcome is flatly inconsistent with the FAA's goal of promoting the use of arbitration.

If there were any doubt that the question presented here has sweeping legal and practical ramifications, the sheer volume of commentary would allay it. See, *e.g.*, Albina Gasanbekova, *Building A Circuit Split: Updating Moves by the NLRB on Class Waivers*, 34 Alternatives to High Cost Litig. 60 (2016); Michael Hoenig & Linda M. Brown, *Arbitration and Class Action Waivers Under* Concepcion*: Reason and Reasonableness Deflect*

Strident Attacks, 68 Ark. L. Rev. 669 (2015); Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown Over the Right to Collective Action in Workplace Disputes*, 52 Am. Bus. L.J. 75 (2015); Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 Harv. L. Rev. 907 (2015); Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* D.R. Horton *and* Concepcion, 35 Berkeley J. Emp. & Lab. L. 175 (2014); James R. Montgomery, *'Horton and the Who': Determining Who Is Affected by the Emerging Statutory Battle Between the FAA and Federal Labor Law*, 2014 J. Disp. Resol. 363; Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013 (2013). Few cases come to the Court with such a substantial chorus highlighting the importance of the issue and the need for the Court's intervention.

2. This case is the optimal vehicle for considering and resolving the question presented. To check the obvious boxes: the question was pressed below, fully briefed by the parties, and passed on by the court of appeals as the sole basis for its decision. There are thus no impediments to the Court's resolution of the question presented in this case.

Beyond that, however, this case presents the question not only squarely but in depth. Uniquely among the decisions in the circuit conflict, the opinions below fully develop the arguments on both sides of the question. They debate whether to begin from the proposition that "employees have the right to pursue work-related legal claims together," App., *infra*, 3a, or the proposition that "agreements to arbitrate are valid, irrevocable, and enforceable," *id.* at 27a (Ikuta, J., dissenting) (internal quo-

tation marks and citation omitted). They extensively analyze this Court's arbitration-related case law. Compare *id.* at 12a-24a (majority opinion) (discussing, *inter alia*, *CompuCredit*, *Italian Colors*, and *Gilmer*), with *id.* at 27a-34a (Ikuta, J., dissenting) (similar). And they address the relevance of the FAA's saving clause, compare *id.* at 16a-18a (majority opinion), with *id.* at 38a-41a (Ikuta, J., dissenting), and the policy implications of the majority's rule, compare *id.* at 22a (majority opinion), with *id.* at 41a-42a (Ikuta, J., dissenting). No other decision has so clearly and thoroughly framed the competing arguments.

In addition, this case presents the paradigmatic context in which controversies about the validity of arbitration agreements arise—a private lawsuit brought by employees against their employer, in which the employer seeks to compel arbitration. See, *e.g.*, *Patterson*, *supra*; *Lewis*, 823 F.3d at 1147; *Sutherland*, 726 F.3d at 290; *Owen*, 702 F.3d at 1050; *Totten* v. *Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1254 (C.D. Cal. 2016); *Nanavati* v. *Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1077 (N.D. Cal. 2015); *Dixon* v. *NBCUniversal Media, LLC*, 947 F. Supp. 2d 390, 403 n.11 (S.D.N.Y. 2013). As a result, the parties to this case, an employer and its employees, are best situated to represent the two opposing viewpoints on the question presented under the FAA and the NLRA. To the extent the NLRB has taken a position on the issue, moreover, it participated in this case before the Ninth Circuit as an amicus curiae, and would presumably continue to do so in this Court if certiorari is granted.

Of particular note, moreover, the circuit conflict at hand affects petitioners in a particularly acute way, making this case a uniquely compelling vehicle in which to resolve the question presented. EY is one of the Na-

tion's largest professional-services firms, with approximately 40,000 employees in every corner of the country. Virtually all of those employees have signed the arbitration provision at issue here as a condition of employment. As noted above, however, the Second and the Ninth Circuits have reached different results concerning the very same arbitration provision, with the Second Circuit holding that it is valid and enforceable and the Ninth Circuit holding that it is not. Compare App., *infra*, 24a, with *Sutherland*, 726 F.3d at 297 n.8. As matters currently stand, therefore, EY's ability to enforce its uniform nationwide arbitration provision depends on where a given employee is located (or where the employee files suit). Petitioners thus have a particularly strong interest in defending the validity of agreements requiring an employee to arbitrate claims against an employer on an individual basis. In addition, should the Court grant review in this case, it will have the luxury of knowing that it is comparing apples to apples, considering an arbitration agreement that has divided the circuits without any concern about complicating peculiarities in the language (or method of adoption) of a less widely used agreement.

In sum, the Ninth Circuit's decision deepens a widely recognized conflict—and, indeed, creates a conflict specific to petitioners—on the question whether the National Labor Relations Act prohibits the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis. That question is undeniably important and recurring, and this case is the optimal vehicle for considering it. The Court should grant the petition for certiorari and resolve a circuit conflict that is affecting employers and employees across the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2016

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-16599

STEPHEN MORRIS; KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

ERNST & YOUNG, LLP; ERNST & YOUNG U.S., LLP,
Defendants-Appellees.

Filed: August 22, 2016

Before: THOMAS, Chief Judge, and IKUTA and HURWITZ, Circuit Judges.

OPINION

THOMAS, Chief Judge.

In this case, we consider whether an employer violates the National Labor Relations Act by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms and conditions of employment. We conclude that it does, and vacate the order of the district court compelling individual arbitration.

I

Stephen Morris and Kelly McDaniel worked for the accounting firm Ernst & Young. As a condition of employment, Morris and McDaniel were required to sign agreements not to join with other employees in bringing legal claims against the company. This "concerted action waiver" required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in "separate proceedings." The effect of the two provisions is that employees could not initiate concerted legal claims against the company in any forum—in court, in arbitration proceedings, or elsewhere.

Nonetheless, Morris brought a class and collective action against Ernst & Young in federal court in New York, which McDaniel later joined. According to the complaint, Ernst & Young misclassified Morris and similarly situated employees. Morris alleged that the firm relied on the misclassification to deny overtime wages in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C.A. § 201 *et seq.*, and California labor laws.

The case was eventually transferred to the Northern District of California. There, Ernst & Young moved to compel arbitration pursuant to the agreements signed by Morris and McDaniel. The court ordered individual arbitration and dismissed the case. This timely appeal followed.

Morris and McDaniel argue that their agreements with the company violate federal labor laws and cannot be enforced. They claim that the "separate proceedings" clause contravenes three federal statutes: the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*,

the Norris LaGuardia Act, 29 U.S.C. § 101 *et seq.*, and the FLSA. Relevant here, Morris and McDaniel rely on a determination by the National Labor Relations Board ("NLRB" or "Board") that concerted action waivers violate the NLRA. *D.R. Horton*, 357 NLRB No. 184 (2012) ("*Horton I*"), *enf. denied* 737 F.3d 344 (5th Cir. 2013) ("*Horton II*"); *see also Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) ("*Murphy Oil I*"), *enf. denied* 808 F.3d 1013 (5th Cir. 2015) ("*Murphy Oil II*").

We have jurisdiction under 28 U.S.C. § 1331 and review the district court's order to compel arbitration *de novo*. *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647, 652 (9th Cir. 2009).

II

This case turns on a well-established principle: employees have the right to pursue work-related legal claims together. 29 U.S.C. § 157; *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Concerted activity—the right of employees to act *together*—is the essential, substantive right established by the NLRA. 29 U.S.C. § 157. Ernst & Young interfered with that right by requiring its employees to resolve all of their legal claims in "separate proceedings." Accordingly, the concerted action waiver violates the NLRA and cannot be enforced.

A

The Supreme Court has "often reaffirmed that the task of defining the scope of [NLRA rights] 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.'" *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (quoting *Eastex*, 437 U.S. at 568). "[C]onsiderable deference" thus

attaches to the Board's interpretations of the NLRA. *Id.* Thus, we begin our analysis with the Board's treatment of similar contract terms.

The Board has concluded that an employer violates the NLRA

> when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.

Horton I, 357 NLRB No. 184, slip op. at 1.

The Board's determination rested on two precepts. First, the Board interpreted the NLRA's statutory right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" to include a right "to join together to pursue workplace grievances, including through litigation." *Id.* at 2 (interpreting 29 U.S.C. § 157). Second, the Board held that an employer may not circumvent the right to concerted legal activity by requiring that employees resolve all employment disputes individually. *Id.* at 4-5, 13 (interpreting 29 U.S.C. § 158). In other words, employees must be able to initiate a work-related legal claim together in some forum, whether in court, in arbitration, or somewhere else. *Id.* A concerted action waiver prevents this: employees may only

resolve disputes in a single forum—here, arbitration—and they may never do so in concert. *Id.*[1]

The Supreme Court has instructed us to review the Board's interpretations of the NLRA under the familiar two-step framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984). *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992) (*Chevron* framework applies to NLRB constructions of the NLRA). The Board's reasonable interpretations of the NLRA command deference, while the Board's remedial preferences and interpretations of unrelated statutes do not. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002).[2]

Under *Chevron*, we first look to see "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. In analyzing Congressional intent, we employ the "traditional tools of statutory construction." *Id.* at 843 & n. 9. We not only look at

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[1] The contract in *Horton I* required all claims to be heard in arbitration and required the arbitrator to "hear only Employee's individual claims." *Horton I*, 357 NLRB No. 184, slip op. at 1. It also contained an express waiver of class or collective proceedings in arbitration. *Id.* Ernst & Young concedes that the "separate proceedings" term in the exclusive arbitration agreements here has the same effect.

[2] The Board has both rulemaking and adjudicative powers, 29 U.S.C. § 156, § 160, and it may authoritatively interpret the NLRA through either process. *NLRB v. Bell Aerospace Co. Div. of Textron*, 416 U.S. 267, 294 (1974) (concluding that the Board may announce "new principles in an adjudicative proceeding"). Our analysis under *Chevron* does not extend to the Board's interpretation of statutes it does not administer, to the Board's interpretation of Supreme Court cases, or to the Board's remedial preferences.

the precise statutory section in question, but we also analyze the provision in the context of the governing statute as a whole, presuming congressional intent to create a "'symmetrical and coherent regulatory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)). If we conclude that "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

In this case, we need go no further. The intent of Congress is clear from the statute and is consistent with the Board's interpretation.

To determine whether the NLRA permits a total waiver on concerted legal activity by employees, we begin with the words of the statute. The NLRA establishes the rights of employees in § 7. It provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]

29 U.S.C. § 157.

Section 8 enforces these rights by making it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158; *see NLRB v. Bighorn Beverage*, 614 F.2d 1238, 1241 (9th Cir. 1980)

(describing relationship between sections; § 7 establishes rights and § 8 enforces them).

Section 7 protects a range of concerted employee activity, including the right to "seek to improve working conditions through resort to administrative and judicial forums." *Eastex*, 437 U.S. at 566; *see also City Disposal Sys.*, 465 U.S. at 835 ("There is no indication that Congress intended to limit [§ 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."). Therefore, "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act." *Brady v. NFL*, 644 F.3d 661, 673 (8th Cir. 2011). So too is the "filing by employees of a labor related civil action." *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976). Courts regularly protect employees' right to pursue concerted work-related legal claims under § 7. *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) ("filing a civil action by a group of employees is protected activity" under § 7) (internal quotation marks and citation omitted); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (same).

It is also well-established that the NLRA establishes the right of employees to act in *concert*: "Employees shall have the right . . . to engage in other *concerted* activities for the purpose of *collective* bargaining or other *mutual* aid and protection." 29 U.S.C. § 157 (emphasis added). Concerted action is the basic tenet of federal labor policy, and has formed the core of every significant federal labor statute leading up to the NLRA. *City Disposal Sys.*, 465 U.S. at 834-35 (describing history of the

term "concert" in statutes affecting federal labor policy). Taken together, these two features of the NLRA establish the right of employees to pursue work-related legal claims, and to do so together. The pursuit of a concerted work-related legal claim "clearly falls within the literal wording of § 7 that '[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) (quoting 29 U.S.C. § 157). The intent of Congress in § 7 is clear and comports with the Board's interpretation of the statute.[3]

The same is true for the Board's interpretation of § 8's enforcement provisions. Section 8 establishes that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." 29 U.S.C. § 158. A "separate proceedings" clause does just that: it prevents the initiation of any concerted work-related legal claim, in any forum. Preventing the exercise of a § 7 right strikes us as "interference" within the meaning of § 8. Thus, the Board's determination that a concerted action waiver violates § 8 is no surprise. And an employer violates § 8 a second time by conditioning

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[3] *Eastex* clarifies that concerted activity extends to judicial forums, and it does not limit concerted activity to any particular vehicle or mechanism. 437 U.S. at 556 & n.15. Further, we reject the argument that the NLRA cannot protect a right to concerted legal action because Rule 23 class actions did not exist until after the NLRA was passed. *See City Disposal Sys.*, 465 U.S. at 835 (noting that the NLRA has forward-looking view of § 7 protections). Rule 23 is not the source of employee rights; the NLRA is. *Eastex* settles this question by expressly including concerted legal activity within the set of protected § 7 activities. 437 U.S. at 566.

employment on signing a concerted action waiver. *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940) ("Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree" to waive the statute's substantive protections); *see Retlaw Broad. Co.*, 310 NLRB no. 160, slip op. at 14 (1993), *enforced*, 53 F.3d 1002 (9th Cir. 1995) (section 8 prohibits conditioning employment on waiver of § 7 right).[4] Again, we need not proceed to the second step of *Chevron* because the intent of Congress in § 8 is clear and matches the Board's interpretation.

Section 8 has long been held to prevent employers from circumventing the NLRA's protection for *concerted* activity by requiring employees to agree to *individual* activity in its place. *National Licorice*, for example, involved a contract clause that discouraged workers from redressing grievances with the employer "in any way except personally." 309 U.S. at 360. This clause violated the NLRA. *Id.* at 361. The individual dispute resolution practice envisioned by the contract, and required by the employer, represented "a continuing means of thwarting the policy of the Act." *Id.*

Similarly, *N.L.R.B. v. J.H. Stone & Sons*, 125 F.2d 752 (7th Cir. 1942), concluded that individual dispute resolution requirements nullify the right to concerted activity established by § 7:

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[4] In contrast, there was no § 8 violation in *Johnmohammadi v. Bloomingdale's, Inc.* because the employee there could have opted out of the individual dispute resolution agreement and chose not to. 755 F.3d 1072, 1076 (9th Cir. 2014).

> By the clause in dispute, the employee bound himself to negotiate any differences with the employer and to submit such differences to arbitration. The result of this arbitration was final. Thus the employee was obligated to bargain individually and, in case of failure, was bound by the result of arbitration. This is the very antithesis of collective bargaining.

Id. at 756.

The "separate proceedings" clause in this case is no different. Under the clause, the employee is obligated to pursue work-related claims individually and, no matter the outcome, is bound by the result. This restriction is the "very antithesis" of § 7's substantive right to pursue concerted work-related legal claims. For the same reason, the Seventh Circuit recently concluded that "[a] contract that limits Section 7 rights that is agreed to as a condition of continued employment qualifies as 'interfer[ing] with' or 'restrain[ing] . . . employees in the exercise' of those rights in violation of Section 8(a)(1)." *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016). Indeed, § 7 rights would amount to very little if employers could simply require their waiver.

In sum, the Board's interpretation of § 7 and § 8 is correct. Section 7's "mutual aid or protection clause" includes the substantive right to collectively "seek to improve working conditions through resort to administrative and judicial forums." *Eastex*, 437 U.S. at 566; *accord City Disposal Sys.*, 465 U.S. at 834-35. Under § 8, an employer may not defeat the right by requiring employees to pursue all work-related legal claims individually.

See J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) ("Individual contracts . . . may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act"). The NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*.[5]

Applied to the Ernst & Young contract, § 7 and § 8 make the terms of the concerted action waiver unenforceable. The "separate proceedings" clause prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else. The result: interference with a protected § 7 right in violation of § 8. Thus, the "separate proceedings" terms in the Ernst & Young contracts cannot be enforced.[6]

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[5] Because congressional intent can be ascertained employing the usual tools of statutory construction, we do not proceed to step two of the *Chevron* analysis. However, if that analysis were undertaken, the only conclusion could be that "[t]he Board's holding is a permissible construction of 'concerted activities for . . . mutual aid or protection' by the agency charged by Congress with enforcement of the Act." *Weingarten*, 420 U.S. at 260 (quoting 29 U.S.C. § 157).

[6] Ernst & Young also argues for the first time on appeal that there is no evidence that Morris and McDaniel are statutory employees covered by the NLRA. This argument was not adequately raised before the district court and is therefore waived. *See Solis v. Matheson*, 563 F.3d 425, 437 (9th Cir. 2009). Likewise, we also reject the claim that the Board's interpretations of the NLRA in *Horton I* and *Murphy Oil I* do not apply here because there was no NLRB proceeding or finding of an unfair labor practice. We agree with the agency's interpretation of the NLRA because it gives effect to Congress's intent. Our agreement has nothing to do with the procedural history of the cases from which the Board's interpretation arose.

B

The Federal Arbitration Act ("FAA") does not dictate a contrary result. The "separate proceedings" provision in this case appears in an agreement that directs employment-related disputes to arbitration. But the arbitration requirement is not the problem. The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA. The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration.

The FAA "was enacted in 1925 in response to widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). In relevant part, it provides that,

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Act requires courts to "place arbitration contracts 'on equal footing with all other contracts,'" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)), and to "enforce them according to their terms," *Concepcion*, 563 U.S. at 339. Not all contract terms receive blanket enforcement under the FAA, however. The FAA's

> saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

Id. (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). Accordingly, when a party raises a defense to the enforcement of an arbitration provision, a court must determine whether the defense targets arbitration contracts without "due regard . . . to the federal policy favoring arbitration." *DIRECTV*, 136 S. Ct. at 471 (quoting *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)).

The contract defense in this case does not "derive [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. An agreement to arbitrate work-related disputes does not conflict with the NLRA. Indeed, federal labor policy favors and promotes arbitration. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

The illegality of the "separate proceedings" term here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes *in court* and in "separate proceedings." The same infirmity would exist if the contract required disputes to be resolved through casting lots, coin toss, duel, trial by ordeal, or any other dispute resolution mechanism, if the contract (1) limited resolution to that mechanism and (2) required separate

individual proceedings. The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims.[7]

When an illegal provision not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality.[8] 9 U.S.C. § 2; *Concepcion*, 563 U.S. at 339. The term may be excised, or the district court may decline enforcement of the contract altogether. *See* 19 Richard Lord, 8 *Williston on Contracts* § 19:70 (4th ed. 1990) ("Illegal portions of a contractual agreement may be severed if the illegal provision is not central to the parties' agreement."); *see also Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 433 (9th Cir. 2015) ("'generally applicable' contract defense" is "preserved by § 2's saving clause").

Crucial to today's result is the distinction between "substantive" rights and "procedural" rights in federal law. The Supreme Court has often described rights that

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[7] In contrast, the arbitration cases cited by the dissent and Ernst & Young involved litigants seeking to avoid an arbitral forum—their defenses targeted arbitration. Here, Morris and McDaniel seek to exercise substantive rights guaranteed by federal statute in *some* forum, including in arbitration.

[8] *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), is not to the contrary. Under *Stolt*, an arbitrator may not add to the terms of an arbitration agreement, and therefore may not order class arbitration unless the contract provides for it *Id.* at 684. This does not require a court to enforce an illegal term. Nor would *Stolt* prevent the district court, on remand, from severing the "separate proceedings" clause to bring the arbitration provision into compliance with the NLRA.

are the essential, operative protections of a statute as "substantive" rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). In contrast, procedural rights are the ancillary, remedial tools that help secure the substantive right. *See id.*; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012) (describing difference between statute's "guarantee" and provisions contemplating ways to enforce the core guarantee).[9]

The difference is key, because substantive rights cannot be waived in arbitration agreements. This tenet is a fundamental component of the Supreme Court's arbitration jurisprudence: "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628. Thus, if a contract term in an arbitration agreement "operate[s] . . . as a prospective waiver of a party's right to pursue statutory remedies for [substantive rights], we would have little hesitation in condemning the agreement." *Id.* at 637 n.19; *see also Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *Green Tree Fin. Corp.-Al. v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer*, 500 U.S. at 28; *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 240, (1987).

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[9] The Age Discrimination in Employment Act ("ADEA"), for example, establishes a primary, substantive right against age discrimination. 29 U.S.C. § 623; *Gilmer*, 500 U.S. at 27. It provides for collective proceedings as one way, among many, to secure that right. 29 U.S.C. § 626 (providing for "Recordkeeping, investigation, and enforcement" of the ADEA, including collective legal redress).

The FAA does not mandate the enforcement of contract terms that waive substantive federal rights. Thus, when an arbitration contract professes the waiver of a substantive federal right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield. *See Epic Sys.*, 823 F.3d at 1159 ("Because the NLRA renders [the defendant's] arbitration provision illegal, the FAA does not mandate its enforcement.").[10]

The rights established in § 7 of the NLRA—including the right of employees to pursue legal claims together—are substantive. They are the central, fundamental protections of the Act, so the FAA does not mandate the enforcement of a contract that alleges their waiver. The text of the Act confirms the central role of § 7: that section establishes the "*Right* of employees as to organization." 29 U.S.C. § 157 (emphasis added). No other provision of the Act creates these sorts of rights. Without § 7,

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[10] Contrary to the suggestions of the dissent, the Supreme Court has repeatedly endorsed the distinctive roles of substantive and procedural rights in its recent arbitration case law. As recently as *Italian Colors*, the Supreme Court has held that the key question for courts assessing a statutory rights claim arising from an arbitration agreement is whether the agreement "constitute[s] the elimination of the *right to pursue* that remedy." 133 S. Ct. at 2311 (emphasis in original). Similarly, in *CompuCredit*, the Court distinguished the core, substantive "guarantee" of the Credit Repair Organizations Act ("CROA") from a provision that contemplated the possibility of a judicial forum for vindicating the core right. 132 S. Ct. at 671 (holding that contract "parties remain free to specify" their choice of judicial forum "so long as the *guarantee*" of the Act "is preserved." (emphasis in original)). Contract parties can agree on the procedural terms they like (such as resolving disputes in arbitration), but they may not agree to leave the substantive protections of federal law at the door.

the Act's entire structure and policy flounder. For example, § 8 specifically refers to the "exercise of the rights guaranteed in section 157." 28 U.S.C. § 158; *Bighorn Beverage*, 614 F.2d at 1241 ("Section 8(a)(1) of the Act implements [§ 7's] guarantee").

The Act's other enforcement sections are similarly confused without the rights established in § 7. *See, e.g.*, 29 U.S.C. § 160 (providing powers of the Board to prevent interference with rights in § 7). There is no doubt that Congress intended for § 7 and its right to "concerted activities" to be the "primary substantive provision" of the NLRA. *See Gilmer*, 500 U.S. at 24. For this reason, the right to concerted employee activity cannot be waived in an arbitration agreement.[11]

The dissent ignores this fundamental component of the Supreme Court's arbitration jurisprudence and argues that we must first locate a "contrary congressional command" before preventing the enforcement of an invalid contract term. But as the Seventh Circuit put it, "this argument puts the cart before the horse." *Epic Sys.*, 823 F.3d at 1156. Rather, "[b]efore we rush to decide whether one statute eclipses another, we must stop to see if the two statutes conflict at all." *Id.* The saving clause in the FAA prevents the need for such a conflict.

The dissent and Ernst & Young insist that we must effectively ignore the saving clause and first search to

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[11] An individual can opt-out of a class action, or opt-in to a collective action, in federal court (both procedural mechanisms). This does not enable an employer to require the same individual to waive the substantive labor right to initiate concerted activities set forth in the NLRA.

see which of two statutes will "trump" the other. But this is not the way the Supreme Court has instructed us to approach statutory construction. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) ("[W]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (citation omitted)). Nor is a hunt for statutory conflict the "single question" the Supreme Court has told us to ask when examining the FAA's interaction with other federal statutes. Dissent at 35-36. Indeed, if we first had to locate a conflict between the FAA and other statutes, the FAA's saving clause would serve no purpose, which cannot be the case. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (citation omitted)); *see Epic Sys.*, 823 F.3d at 1157 (holding that there is no inherent conflict between the FAA and the NLRA).[12] Instead, we join the Seventh Circuit in treating the interaction between the NLRA and the FAA in a very ordinary way: when an arbitration contract professes to waive a substantive federal right, the saving clause of the FAA prevents the enforcement of that waiver.[13]

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[12] Neither the text of the FAA nor the Supreme Court's arbitration cases support the dissent's theory that the FAA's saving clause functions differently when a federal, as opposed to state, statute renders a contract term susceptible to an illegality defense.

[13] Because we see no inherent conflict between the FAA and the NLRA, we make no holding on which statute would win in a fight, nor do we opine on the meaning of their respective dates of passage, re-passage, and amendment.

Thus, the dissent's citations to cases involving the waiver of *procedural* rights are misplaced. *CompuCredit*, for example, was a choice-of-judicial-forum case that addressed the waiver of procedural rights. In the Supreme Court's words, the case concerned "whether claims under the [CROA] can proceed in an arbitrable forum." 132 S. Ct. at 673. In today's case, the issue is not whether any particular forum, including arbitration, is available but rather which substantive rights must be available within the chosen forum. And the Supreme Court has repeatedly held that the core, substantive "rights" created by federal law survive contract terms that purport their waiver. Such was the case in *CompuCredit*, where the Court concluded that the use of a judicial forum contemplated by the CROA could be waived so long as "*the guarantee of the legal power to impose liability*—is preserved." 132 S. Ct. at 671 (emphasis in original). In other words, parties can choose their forums but they cannot contract away the basic guarantees of a federal statute.

Gilmer was also a judicial-choice-of-forum case that addressed the waiver of procedural rights. There the Supreme Court again distinguished between a waivable procedural right (to use a court for class claims rather than arbitration) and a nonwaivable substantive right (to be free from age discrimination). 500 U.S. at 27-29. Not surprisingly, the Court held that the procedural right to use class proceedings in federal court could be waived. *Id.* at 32.[14]

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[14] In fact, the arbitration procedures in *Gilmer* allowed for collective proceedings. *Id.* The plaintiff simply preferred court adjudication.

Italian Colors, as well, was a judicial forum case that endorsed the distinction between a statute's basic guarantee and the various ways litigants may go about vindicating it. The Court was careful to distinguish between the matters "involved in *proving* a statutory remedy" and whether an agreement "constitute[s] the elimination of the *right to pursue* that remedy." *Italian Colors*, 133 S. Ct. at 2311. The plaintiffs objected that it would be infeasible to pursue their antitrust claims against the defendant without the ability to form a class. The Court rejected this argument, noting that so long as the substantive federal right remains—there, the right to pursue antitrust claims in some forum—then the arbitration agreements would be enforced according to their terms. *Id.* at 2310-12.

The dissent misreads these cases to require a conflict between the FAA and the substantive provisions of other federal statutes. But as the Supreme Court has repeatedly made clear, there is a limiting principle built into the FAA on what may be waived in arbitration: where substantive rights are at issue, the FAA's saving clause works in conjunction with the other statute to prevent conflict.

The interaction between the NLRA and the FAA makes this case distinct from other FAA enforcement challenges in at least three additional and important ways.

First, because a substantive federal right is waived by the contract here, it is accurate to characterize its terms as "illegal." The dissent objects that a term in an arbitration contract can only be "illegal" if Congress issues a contrary command specifically referencing arbitration. But then it proceeds to cite cases where no sub-

stantive federal rights were waived. In those cases, the conflict between contract terms and federal law was less direct. In *Italian Colors*, for example, the Court concluded that the antitrust laws establish no statutory right to pursue concerted claims: the acts "make no mention of class actions." *Id.* at 2309. In contrast, the federal statutory regime in this case does exactly the opposite. Where the antitrust laws are silent on the issue of concerted legal redress, the NLRA is unambiguous: concerted activity is the touchstone, and a ban on the pursuit of concerted work-related legal claims interferes with a core, substantive right.

Second, the enforcement defense in this case has nothing to do with the adequacy of arbitration proceedings. In *Concepcion* and *Italian Colors*, the Court held that arguments about the adequacy of arbitration necessarily yield to the policy of the FAA. *Concepcion*, 563 U.S. at 351; *Italian Colors*, 133 S. Ct. at 2312. The Court "specifically rejected the argument that class arbitration [is] necessary to prosecute claims 'that might otherwise slip through the legal system.'" *Italian Colors*, 133 S. Ct. at 2312 (quoting *Concepcion*, 563 U.S. at 351). Here, the NLRA's prohibition on enforcing the "separate proceedings" clause has nothing to do with the adequacy of arbitration. The dissent and Ernst & Young attempt to read *Concepcion* for the proposition that concerted claims and arbitration are fundamentally inconsistent. But *Concepcion* makes no such holding. *Concepcion* involved a consumer arbitration contract, not a labor contract, and there was no federal statutory scheme that declared the contract terms illegal. 563 U.S. at 338. The defense in that case was based on a judge-made state law rule. In contrast, the illegality of the contract term here follows directly from the NLRA. Arbitration between groups of

employees and their employers is commonplace in the labor context. It would no doubt surprise many employers to learn that individual proceedings are a "fundamental" attribute of workplace arbitration. *See also Gilmer*, 500 U.S. at 32, (noting that employer's arbitration "rules also provide for collective proceedings").[15]

Third, the enforcement defense in this case does not specially "disfavor" arbitration. The dissent makes dire predictions about the future of workplace arbitration if the "separate proceedings" clause is invalidated. However, our holding is not that arbitration may not be used in workplace disputes. Quite the contrary. Rather, our holding is simply that when arbitration or any other mechanism is used exclusively, substantive federal rights continue to apply in those proceedings. The only role arbitration plays in today's case is that it happens to be the forum the Ernst & Young contract specifies as exclusive. The contract here would face the same NLRA troubles if Ernst & Young required its employees to use *only* courts, or *only* rolls of the dice or tarot cards, to resolve workplace disputes—so long as the exclusive forum provision is coupled with a restriction on concerted activity in that forum. At its heart, this is a labor law case, not an arbitration case.

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[15] The dissent suggests that employee-claimants could act in "concert" by simply hiring the same lawyers. This is not what the NLRA contemplates by the term "concert." An employer could not, for example, require its employees to sign a pledge not to join a union but remain in conformity with the NLRA by suggesting that employees hire similar attorneys to represent them in wage negotiations. *See also City Disposal Sys.*, 465 U.S. at 834-35 (discussing the term "concert" in federal labor law at the time of the NLRA's passage).

Further, nothing in the Supreme Court's recent arbitration case law suggests that a party may simply incant the acronym "FAA" and receive protection for illegal contract terms anytime the party suggests it will enjoy arbitration less without those illegal terms. We have already held that *Concepcion* supports no such argument:

> The Supreme Court's holding that the FAA preempts state laws having a "disproportionate impact" on arbitration cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration. Our court has recently explained the nuance: "*Concepcion* outlaws discrimination in state policy that is *unfavorable* to arbitration."

Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 927 (9th Cir. 2013) (quoting *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013)). Do not be misled. Arbitration is consistent with, and encouraged by, the NLRA following today's opinion.

At bottom, the distinguishing features of today's case are simple. The NLRA establishes a core right to concerted activity. Irrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*. The structure of the Ernst & Young contract prevents that. Arbitration, like any other forum for resolving disputes, cannot be structured so as to exclude all concerted employee legal claims. As the Supreme Court has instructed, when "private contracts conflict with" the NLRA, "they obviously must yield or the Act

would be reduced to a futility." *J.I. Case*, 321 U.S. at 337.[16]

III

In sum, the "separate proceedings" provision of the Ernst & Young contract interferes with a substantive federal right protected by the NLRA's § 7. The NLRA precludes contracts that foreclose the possibility of concerted work-related legal claims. An employer may not condition employment on the requirement that an employee sign such a contract.

It is "well established . . . that a federal court has a duty to determine whether a contract violates the law before enforcing it." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). Because the district court's order compelling arbitration was based, at least in part, on the separate proceedings provision, we must vacate the order and remand to the district court to determine whether the "separate proceedings" clause is severable from the contract. We take no position on whether arbitration may ultimately be required in this case.

In addition, because the contract's conflict with the NLRA is determinative, we need not—and do not—reach plaintiff's alternative arguments regarding the

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[16] We recognize that our sister Circuits are divided on this question. We agree with the Seventh Circuit, the only one that "has engaged substantively with the relevant arguments." *Epic Sys.*, 823 F.3d at 1159; *but see Murphy Oil II*, 808 F.3d at 1018 (enforcing employer's concerted action waiver under the FAA); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-54 (8th Cir. 2013).

Norris LaGuardia Act, the FLSA, or whether Ernst & Young waived its right to arbitration.[17]

REVERSED AND REMANDED.

IKUTA, Circuit Judge, dissenting.

Today the majority holds that § 7 of the National Labor Relations Act (NLRA) precludes employees from waiving the right to arbitrate their disputes collectively, thus striking at the heart of the Federal Arbitration Act's (FAA) command to enforce arbitration agreements according to their terms. This decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent and joins the wrong side of a circuit split. I dissent.

I

The plaintiffs in this case, Stephen Morris and Kelly McDaniel, entered into an agreement with Ernst & Young that included a program for resolving covered disputes. The parties agreed that the program was "the sole method for resolving disputes within its coverage." Under the program, the parties agreed they would first try to resolve a covered dispute by mediation. If that failed, either party could choose to proceed to binding arbitration. The agreement set forth the applicable procedures. Subparagraph K provided:

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[17] Putative-amici labor scholars' motion for leave to file an *amicus* brief is denied. *See* Fed. R. App. P. 29(e). The motion for judicial notice of additional authorities is also denied. *See Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 940 n.2 (9th Cir. 2011).

> Separate Proceedings. If there is more than one Covered Dispute between the Firm and an Employee, all such Covered Disputes may be heard in a single proceeding. Covered Disputes pertaining to different Employees will be heard in separate proceedings.

As the Supreme Court has explained, such a waiver of class actions is typical in the arbitration context because the class procedural mechanism "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Among other problems, "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process." *Id.* at 347. Class mechanisms also eviscerate the principal benefits of arbitration—speed and informality, "mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348.

Notwithstanding the agreement to arbitrate, Morris brought a complaint in federal district court alleging that Ernst & Young had violated the Fair Labor Standards Act (FLSA) and analogous state law by improperly classifying him and other employees as exempt employees who were not entitled to overtime wages. (McDaniel was later added as a plaintiff.) Morris purported to bring the action as a class action under Rule 23 of the Federal Rules of Civil Procedure and as a collective action under

29 U.S.C. § 216(b) of the FLSA.[1] After some procedural complications not relevant here, Ernst & Young moved to compel arbitration under its agreement. Morris argued that the "Separate Proceedings" clause of his agreement violated § 7 of the NLRA. The district court rejected this argument. In reversing, the majority holds that employees may not be required to waive the use of a class action mechanism in arbitrating or litigating their claims. To the extent the Supreme Court has held that class actions are inconsistent with arbitration, *see Concepcion*, 563 U.S. at 344, the majority effectively cripples the ability of employers and employees to enter into binding agreements to arbitrate.

II

Under the FAA, agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *Concepcion*, 563 U.S. at 339. As the Supreme Court has repeatedly explained, the FAA was

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[1] Section 216(b) provides a class action mechanism similar to that contemplated by Rule 23, although it requires voluntary opt in by the members of the class. It states, in pertinent part:

> An action to recover the liability prescribed in [§ 216(b)] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

enacted to overcome "widespread judicial hostility to arbitration agreements." *Concepcion*, 563 U.S. at 339. The Supreme Court's cases have "repeatedly described the Act as embod[ying] [a] national policy favoring arbitration and a liberal federal policy favoring arbitration agreements." *Id.* at 346 (internal quotation marks and citations omitted). The FAA's national policy applies to the states, *see, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), and forecloses any state statute or common law rule that attempts "to undercut the enforceability of arbitration agreements," *id.* at 16, unless the savings clause in § 2 is applicable, *see Concepcion*, 563 U.S. at 344; *Perry v. Thomas*, 482 U.S. 483, 492 n.9, (1987). Therefore, when a party claims that a state law prevents the enforcement of an arbitration agreement, the court must determine whether that law is preempted by the FAA or is rescued from preemption by the FAA's savings clause. *See Concepcion*, 563 U.S. at 339-42.

But when a party claims that a federal statute makes an arbitration agreement unenforceable, the Supreme Court takes a different approach. In determining whether the FAA's mandate requiring "courts to enforce agreements to arbitrate according to their terms" has been overridden by a different federal statute, the Supreme Court requires a showing that such a federal statute includes an express "contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal quotation marks omitted). The burden is on the party challenging the arbitration agreement to show that Congress expressly intended to preclude a waiver of the judicial forum. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). "If such an intention exists, it will be discoverable in the text of the [federal act], its legislative history, or an 'inherent

conflict' between arbitration and the [federal act's] underlying purposes." *Id.* "Throughout such an inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

Contrary to the majority's focus on whether the NLRA confers "substantive rights," in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express "contrary congressional command" that overrides the FAA. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *CompuCredit*, 132 S. Ct. at 669, *Gilmer*, 500 U.S. at 29.[2] To date, in every case in which the Supreme Court has conducted this analysis of federal statutes, it has harmonized the allegedly contrary statutory language with the FAA and allowed the arbitration agreement at issue to be enforced according to its terms.[3] Thus in *CompuCredit*, the Court

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[2] The Supreme Court has applied the same approach, and reached the same conclusion, in upholding a collective bargaining agreement with a mandatory arbitration clause governed by the NLRA. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265-74 (2009).

[3] Only *Wilko v. Swan* held that the Securities Act of 1933 contained an unwaivable right to a judicial forum for claims under the Act, thereby precluding the enforcement of an arbitration agreement between parties to a sale of securities. 346 U.S. 427, 432-37 (1953). But the Court expressly overruled *Wilko* in *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, rejecting its reasoning as "pervaded . . . by the old judicial hostility to arbitration." 490 U.S. 477, 480, 109 (1989) (internal quotation marks omitted); *see also Pyett*, 556 U.S. at 266-67.

considered a purported "contrary congressional command" in the Credit Repair Organization Act (CROA), 15 U.S.C. § 1679 et seq., which the plaintiffs claimed precluded consumers from entering an arbitration agreement that waived their right to litigate an action in a judicial forum. 132 S. Ct. at 669. The plaintiffs pointed to the language in CROA that required a business to tell a consumer that "[y]ou have a right to sue," 15 U.S.C. § 1679c(a), that provided for actual and punitive damages in both individual legal actions and class actions, *id.* § 1679g, and that provided that "[a]ny waiver by any consumer of any protection provided by or any right of the consumer" was void and could "not be enforced by any Federal or State court," *id.* § 1679f(a).

The Supreme Court rejected this claim. Overruling the Ninth Circuit, the Court held that had Congress meant to prohibit arbitration clauses, "it would have done so in a manner less obtuse than what respondents suggest." *CompuCredit*, 132 S. Ct. at 672. According to the Court, when Congress wants to restrict the use of arbitration "it has done so with a clarity that far exceeds the claimed indications in the CROA." *Id.* The Supreme Court gave two examples of what would constitute a sufficiently clear "contrary congressional command":

"No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." *Id.* (quoting 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV)).

"Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to

settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." *Id.* (quoting 15 U.S.C. § 1226(a)(2) (2006 ed.)).

Because the language in the two CROA provisions cited by plaintiffs did not expressly state that a predispute arbitration agreement was unenforceable, the Court determined that they were consistent with enforcement of an arbitration agreement. The "right to sue" language, for instance, merely allowed parties to enter into an agreement requiring initial arbitral adjudication, which then could be reviewed in a court of law. *Id.* at 670-71. Because the CROA was "silent on whether claims under the Act can proceed in an arbitrable forum," the Court held that "the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673.

In *Gilmer*, plaintiffs claimed the Age Discrimination in Employment Act of 1967 (ADEA) contained a contrary congressional command to the FAA's mandate. 500 U.S. at 27-30. Specifically, the plaintiffs pointed to language allowing employees to litigate in court as providing an unwaivable right to access a judicial forum: "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purpose of this chapter," 29 U.S.C. § 626(c)(1); *Gilmer*, 500 U.S. at 27. They also pointed to language they claimed precluded employees from waiving the right to bring a class action: "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section . . . 216," 29 U.S.C. § 626(b), where § 216(b) (also at issue here) states that an action under the FLSA may be

brought in court "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated," although the represented employees must consent. In other words, the plaintiffs argued that because the ADEA explicitly provided for a class mechanism, the statute precluded the enforcement of an arbitration agreement that included a class action waiver.

The Supreme Court rejected this argument. Once again, the statutory language was not sufficiently clear to prevent the enforcement of arbitration agreements that included a class action waiver. Looking closely at the text of the statute, the Court noted that while Congress allowed for judicial resolution of claims, it "did not explicitly preclude arbitration or other nonjudicial resolution of claims." *Gilmer*, 500 U.S. at 27-29. Moreover, "the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* at 32. Thus, the language on which the plaintiffs relied was entirely consistent with enforcing an arbitration agreement that precluded a class mechanism. *See also Italian Colors*, 133 S. Ct. at 2311 ("In *Gilmer* . . . we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue . . . expressly permitted collective actions."). Turning to the ADEA's legislative history, the Supreme Court found nothing showing a congressional intention to preclude waiver of a judicial forum. *Gilmer*, 500 U.S. at 29. Indeed, the Court found in the ADEA a "flexible approach to resolution of claims" and other indicia that Congress did not intend to preclude individual arbitration of disputes. *Id.* at 29-31.

Finally, in *Italian Colors*, there was a purported "inherent conflict," *Gilmer*, 500 U.S. at 26, between arbitration and the policies underlying the Sherman and Clayton Acts, 133 S. Ct. at 2310-12. According to plaintiffs, the cost of individually arbitrating their antitrust claims would so far exceed the potential recovery that requiring them to litigate their claims individually would render the plaintiffs unable to vindicate their federal statutory rights. *Id.* The Supreme Court rejected this argument. Examining the text of the acts, the Court noted that the federal acts "make no mention of class actions," and were "enacted decades before the advent of Federal Rule of Civil Procedure 23." *Id.* at 2309. The Court gave even less weight to the plaintiffs' policy arguments. With respect to the argument that "federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration," the Court simply stated that "we have already rejected that proposition" in *Concepcion*. *Id.* at 2310. In *Concepcion*, the Court made clear that the FAA allows parties to waive the use of a class mechanism because such a mechanism "interferes with fundamental attributes of arbitration." 563 U.S. at 344.

In sum, the Supreme Court consistently rejects claims that a "contrary congressional command" precludes courts from enforcing arbitration agreements according to their terms, including when such agreements waive the use of class mechanisms. In analyzing such arguments, the Court has focused primarily on a single question: whether the text of the federal statute at issue expressly precludes the use of a predispute arbitration agreement for the underlying claims at issue. If the statute does not, the Court's "healthy regard for the federal

policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24, leads it to conclude that there is no such contrary command, and the Court reads the purportedly contrary federal statute to allow the enforcement of the agreement to arbitrate. The Court has likewise rejected claims that the legislative history or policy of the federal statute requires a different result. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90 (2000) (noting that the Court has "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, (1989))).

III

Here, the majority ignores the thrust of Supreme Court precedent and declares that arbitration is precluded because it interferes with a substantive right protected by § 7 and § 8 of the NLRA.[4] Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

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[4] Although the majority cites *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), it does not defer to the NLRB's interpretation of § 7 as overriding the command of the FAA in *In re D.R. Horton v. NLRB*, 357 NLRB No. 184 (2012), which was subsequently overruled by the Fifth Circuit. *See D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Rather, the majority states that "the NLRA is unambiguous, and there is no need to proceed to the second step of *Chevron*." Maj. Op. at 13.

> choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 157. Section 8 merely makes it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." 29 U.S.C. § 158(a).

A

Nothing in this language comes remotely close to the examples of contrary congressional commands the Supreme Court identified in *CompuCredit*, where Congress expressly stated that "[n]o predispute arbitration agreement shall be valid or enforceable." 132 S. Ct. at 672. The language of § 7 and § 8 of the NLRA neither mention arbitration nor specify the right to take legal action at all, whether individually or collectively. *See Italian Colors*, 133 S. Ct. at 2309 ("The Sherman and Clayton Acts make no mention of class actions."). Applying Supreme Court precedent, we must conclude there is no "contrary congressional command" in the text of the NLRA.

Moreover, contrary to the majority, Maj. Op. at 6, nothing in either § 7 or § 8 creates a substantive right to the availability of class-wide claims that might be contrary to the FAA's mandate. While the NLRA protects concerted activity, it does not give employees an unwaivable right to proceed as a group to arbitrate or litigate disputes. Rather, as in *CompuCredit* and *Gilmer*, the language can be harmonized with enforcement of an arbitration agreement that waives class action mechanisms. According to a dictionary roughly contemporaneous with the passage of the NLRA, "concerted" action is action

that is "mutually contrived or planned: agreed on." Webster's International Dictionary of the English Language 295 (1903 ed.). A natural reading of § 7's right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" enables employees to jointly arrange, plan, and carry out group efforts to dispute employer positions. In a legal context, this could include joint legal strategies, shared arguments and resources, hiring the same attorneys, or even requesting the Department of Labor to bring an independent action against the employer. But the language does not expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively; even less does it create an unwaivable right to such mechanism. Indeed, the text provides no basis for the majority's conclusion that § 7 gives employees a substantive, unwaivable right to use Rule 23, § 216(b) of the FLSA, or any other procedural mechanism that might be available for bringing class-wide actions.[5] Accordingly, the Supreme Court's precedent compels the conclusion that neither § 7 nor § 8 contains a "contrary congressional command" that precludes enforcing Morris's arbitration agreement according to its terms. If this were not the case, the Court's statement that *Gilmer* "had no qualms in enforcing a class waiver in an arbitration agreement even though the

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[5] The majority claims that *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978), conclusively supports its view that § 7 of the NLRA includes a substantive right to class action procedures. Maj. Op. at 11-12 n.3. This is incorrect. The Court declined to delineate the rights that are provided by § 7 in an administrative or judicial forum, stating: "We do not address here the question of what may constitute 'concerted' activities in this context." *Eastex, Inc.*, 437 U.S. at 566 n.15.

federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions," *Italian Colors*, 133 S. Ct. at 2311, would be meaningless. Under the majority's reasoning, regardless whether a class action waiver survives express language in the ADEA, as *Gilmer* held, the waiver nevertheless is unenforceable in every action by an employee against an employer due to the unwaivable right to class procedures in the NLRA.

Nor does the legislative history of the NLRA demonstrate an intent to preclude individual resolution of disputes. The NLRA was enacted decades before Rule 23 created the modern class action in 1966. As the Fifth Circuit observed, in enacting the NLRA "Congress did not discuss the right to file class or consolidated claims against employers," and therefore "the legislative history also does not provide a basis for a congressional command to override the FAA." *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013). The majority does not cite any legislative history to the contrary.

Finally, there is no "inherent conflict between arbitration" and the "underlying purposes" of the NLRA. *Gilmer*, 500 U.S. at 26. The majority argues that the very purpose of the NLRA is to enable employees to engage in concerted activity, and therefore, it necessarily also has the purpose of enabling employees to engage in collective legal activity, including class actions. Maj. Op. at 9-10. Even assuming that concerted action is "the basic tenet of federal labor policy," *id.* at 10, nothing in the NLRA suggests that this protection includes the right to resolve disputes using a particular legal procedure. The majority's attempt to equate a substantive right to concerted action with a legal procedural mecha-

nism for resolving disputes has no basis in history or Supreme Court precedent. To the contrary, the Court has held that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). Moreover, as the Fifth Circuit pointed out, there is "limited force to the argument that there is an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was (re)enacted." *D.R. Horton*, 737 F.3d at 362. Indeed, as the majority acknowledges, "federal labor policy *favors* and promotes arbitration." Maj. Op. at 16 (emphasis added). *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself."); *Pyett*, 556 U.S. at 257 ("Parties generally favor arbitration precisely because of the economics of dispute resolution.").

In sum, nothing in the text, legislative history, or purposes of § 7 precludes enforcement of an arbitration agreement containing a class action waiver.

B

In order to avoid this conclusion, the majority disregards the Supreme Court's guidance, and instead conflates the question whether "the FAA's mandate has been overridden by a contrary congressional command," *CompuCredit*, 132 S. Ct. at 669 (internal quotation marks omitted), with the question whether an employee's agreement to arbitrate individually is invalid under the FAA's savings clause, 9 U.S.C. § 2 (providing that an

agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). The majority reasons that: (1) the "Separate Proceedings" requirement in Morris's contract that all disputes must be resolved individually is illegal because it violates the NLRA; (2) a party may raise a defense that a contract provision is illegal, and such a defense is generally applicable and not related specifically to arbitration agreements; and therefore (3) in response to Ernst & Young's motion to compel arbitration, Morris's defense that the "Separate Proceedings" requirement is illegal is preserved by the FAA's savings clause. In adopting this line of reasoning, the majority joins the Seventh Circuit (the only circuit with which the majority agrees). *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (holding that § 7 of the NLRA mandates collective legal action for employees, and therefore an arbitration agreement waiving such collective legal action is "illegal" and thus unenforceable under the FAA's savings clause.)

This reasoning is contrary to the Supreme Court's FAA jurisprudence. Maj. Op. at 14-17. First, the Supreme Court does not apply the savings clause to federal statutes; rather, it considers whether Congress has exercised its authority to override the FAA's mandate to enforce arbitration agreements according to their terms. *See CompuCredit*, 132 S. Ct. at 669. If there is no "contrary congressional command," i.e., an express statement such as "[n]o predispute arbitration agreement shall be valid or enforceable," *id.*, then the Supreme Court will conclude that the federal statute at issue can be harmonized with the FAA. Second, the majority's reasoning is specious because it is based on the erroneous assumption that the waiver of the right to use a col-

lective mechanism in arbitration or litigation is "illegal." But such a waiver would be illegal only if it were precluded by a "contrary congressional command" in the NLRA, and here there is no such command.

Moreover, even if the FAA's savings clause were applicable to a federal statute, the majority's construction of § 7 and § 8 of the NLRA as giving employees a substantive, nonwaivable right to classwide actions would not be saved under that clause. As *Concepcion* explained, such a purported right would disproportionately and negatively impact arbitration agreements by requiring procedures that "interfere[] with fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. Because class procedures are generally "incompatible with arbitration," *id.* at 351, and "nothing in [the FAA's savings clause] suggests an intent to preserve [defenses] that stand as an obstacle to the accomplishment of the FAA's objectives," such rules do not fall within the confines of the savings clause, *id.* at 343. The majority's argument that the nonwaivable right to class-wide procedures it has discerned in § 7 applies equally to arbitration and litigation and so is saved by the § 2 savings clause, Maj. Op. at 16-17, was expressly rejected in *Concepcion*, *see* 563 U.S. at 338 (rejecting plaintiffs' argument that a state rule prohibiting class action waivers in adhesion contracts applied equally to judicial and arbitral proceedings and thus fit the § 2 savings clause).

The majority's erroneous reasoning leads to a result that is directly contrary to Congress's goals in enacting the FAA. Given that lawyers are unlikely to arbitrate on behalf of individuals when they can represent a class, *see id.*, 563 U.S. at 347, and an arbitrator cannot hear a class arbitration unless such a proceeding is explicitly provid-

ed for by agreement, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010), the employee's purported nonwaivable right to class-wide procedures virtually guarantees that a broad swath of workplace claims will be litigated, *Concepcion*, 563 U.S. at 347. The majority's reasoning is likewise contrary to the Supreme Court's ruling that collective actions are not necessary to protect employees' federal statutory rights. *See Gilmer*, 500 U.S. at 32; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.").

IV

The Second, Fifth, and Eighth Circuits have concluded that the NLRA does not invalidate collective action waivers in arbitration agreements. *See Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 775 (8th Cir. 2016); *D.R. Horton*, 737 F.3d at 362; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013). These decisions are consistent with Supreme Court precedent, which has made it abundantly clear that arbitration agreements must be enforced according to their terms unless Congress has given an express contrary command.

In teasing out of the NLRA a "mandate" that prevents the enforcement of Morris's arbitration agreement, the majority exhibits the very hostility to arbitration that the FAA was passed to counteract. The Court recognized in *Concepcion* that the pre-FAA judicial antagonism to arbitration agreements "manifested itself in 'a great variety' of 'devices and formulas' declaring arbi-

tration against public policy." 563 U.S. at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Today the majority invents a new such formula. Because I would follow the Supreme Court precedent and join the majority of the circuits concluding that § 7 of the NLRA does not prevent the collective action waiver at issue here, I would hold that Morris's contract must be enforced according to its terms. I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
SAN JOSE DIVISION

No. 12-04964-RMW

STEPHEN MORRIS and KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

ERNST & YOUNG LLP, and
ERNST & YOUNG U.S., LLP, Defendants.

Filed: July 9, 2013

ORDER GRANTING ERNST & YOUNG LLP'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY PROCEEDINGS AND COMPEL ARBITRATION

WHYTE, United States District Judge.

Plaintiffs Stephen Morris ("Morris") and Kelly McDaniel ("McDaniel"), former EY employees, claim that EY unlawfully classified them and other individuals as exempt from federal and California overtime laws. On January 11, 2013, defendants Ernst & Young LLP and

Ernst & Young U.S., LLP, (collectively "EY" or "defendants") moved to dismiss the present action, or in the alternative to stay proceedings and compel arbitration. Having considered the arguments of the parties, and for the reasons set forth below, the court **GRANTS** EY's motion to compel arbitration and dismisses the action accordingly.

I. BACKGROUND

A. The EY Arbitration Agreement

EY maintains a "Common Ground Dispute Resolution Program" ("Dispute Resolution Program" or "Arbitration Agreement") for resolving disputes between EY and employees. Dkt. No. 42-4 (Hoddap Decl., Ex. C). The Arbitration Agreement provides that it "is the sole method for resolving disputes within its coverage." *Id.* ¶ I. Under its terms, the Arbitration Agreement covers "[a]ll claims, controversies or other disputes between [EY] and an Employee that could otherwise be resolved by a court," and provides that "[n]either [EY] nor an Employee will be able to sue in court in connection with a Covered Dispute." *Id.* ¶ II.B.1. Covered disputes include "[c]laims based on federal statutes such as . . . the Fair Labor Standards Act," "based on state statutes," and "concerning wages, salary, and incentive compensation programs." *Id.* ¶ II.C. The Arbitration Agreement is expressly governed by the Federal Arbitration Act ("FAA") or, if the FAA is held not to apply, by New York State law." *Id.* ¶ V.G.

Relevant here, the Arbitration Agreement provides: (1) that "Covered Disputes pertaining to different Employees will be heard in separate proceedings," *id.* ¶ IV.K; (2) that "Arbitrator fees and other costs of the

arbitration . . . [shall] be shared equally to the extent permitted by law and the Arbitration Rules," *id.* ¶ IV.P; and (3) that "[e]ach party will be responsible for the party's own attorney's fees and related expenses, but the Arbitrator will have authority to provide for reimbursement of the Employee's attorney's fees, in whole or part, in accordance with applicable law or in the interest of justice," *id.*

B. The Plaintiffs

McDaniel began her employment at EY on October 1, 2008. McDaniel's signed offer letter included a copy of EY's Arbitration Agreement, and provided therein that that all employment-related disputes would be subject to the Agreement's mandatory mediation or arbitration provisions. In addition, McDaniel signed a confidentiality agreement that incorporated by reference the terms of the Arbitration Agreement. Morris began his employment at EY in January 2005. In March and April of 2006, EY sent an email to all employees attaching a copy of its "revised" Arbitration Agreement, and stating therein that "An Employee indicates his or her agreement to the [Dispute Resolution] Program and is bound by its terms and conditions by beginning or continuing employment with the firm after May [25], 2006." Dkt. Nos. 42-6, 42-7 (McGuire Decl., Exs. A & B). EY asserts that the plaintiffs are bound by the Arbitration Agreement based on their express (McDaniel) or implied (Morris) acceptance of its terms. Defs.' Br. 7. The plaintiffs do not dispute this argument in their opposition brief, *see* Opp'n 4-5, but rather argue that the Arbitration Agreement is unenforceable for five reasons discussed in Part II.B *infra*.

Morris and McDaniel seek approximately $17,642.97 and $28,805.19 in overtime payments respectively, and each claim additional potential damages under California law. Plaintiffs allege that the costs of complying with the Arbitration Agreement and settling each employee's dispute separately "would be in excess of $160,000 in attorney's fees, and $33,500 in expert witness fess, and well over $6,000 of additional costs and potentially in addition to one-half of the arbitrator's estimated $24,000 fee." Opp'n 6.

C. Procedural History

There are three actions related to this case. The first is *Ho v. Ernst & Young LLP*, Case No. 05-04867 ("*Ho*"). In that case, in September 2005, David Ho commenced a class action against EY raising the same claims under the California Labor Code that plaintiffs raise in the present action. *Ho* was then related to *Richards v. Ernst & Young LLP*, Case No. 08-04988 and *Landon v. Ernst & Young LL*, Case No. 08-02853 (collectively "*Ho* related cases"). Morris and McDaniel, the plaintiffs here, were putative class members in the *Ho* related cases. In *Ho*, the court denied EY's motion to compel arbitration on the basis that EY waived its right to enforce the Arbitration Agreement. *Ho*, No. 05-04867, 2011 WL 4403625, at *6 (N.D. Cal. Sept. 20, 2011). The court found waiver based on the significant prejudice to the plaintiffs resulting from nearly six years of litigation before EY moved to compel arbitration. *Id.* The court also denied class certification with respect to plaintiff Fernandez. *Id.* at *3; *Ho*, 2011 WL 4985047 (N.D. Cal. Oct. 19, 2011) (order denying plaintiffs' motion for reconsideration on the class certification issue with respect to Fernandez). After the court's finding that EY waived the right to arbitrate

and denial-in-part of class certification, on December 8, 2011, plaintiffs moved to add Morris as a new representative plaintiff. *Ho*, No. 05-04867, Dkt. No. 311. On January 11, 2012, the court denied the plaintiffs' request to add Morris as a class representative in *Ho* based on undue delay. *Id.*, Dkt. No. 322.

In February 2012, Morris filed the present action in the Southern District of New York, alleging six causes of action related to the alleged misclassification as exempt from federal and California overtime laws under the Fair Labor Standards Act ("FLSA") and the California Labor Code. In April 2012, Morris amended his complaint to add McDaniel, who asserted the same claims as Morris. Neither Morris nor McDaniel attempted to utilize EY's Dispute Resolution Program to resolve their dispute. In May 2012, EY filed motions to transfer this case from the Southern District of New York to the Northern District of California and to relate this action to the *Ho* related cases. Dkt. No. 24. The court granted the motions, and the cases were consolidated and reassigned to the undersigned. Dkt. No. 36. On January 11, 2013, EY filed the present motion to compel arbitration.

II. ANALYSIS

A. Legal Standard

Under the FAA, a contractual agreement "to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "[T]his provision . . . reflect [s] both a 'liberal federal policy favoring arbitration,' and the 'fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC*

v. Concepcion, 131 S. Ct. 1740, 1745 (2011) (internal quotations omitted). Thus, "[t]he court's role under the [FAA] is ... limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000) (citing 9 U.S.C. § 4).

Claims based on statutory rights may be arbitrated pursuant to the FAA "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *see also Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The Court has seldom found congressional intent to preclude such a waiver, and has enforced contracts to arbitrate claims under the Sherman Act, the Racketeer Influenced and Corrupt Organizations Act, Age Discrimination in Employment Act, and the Securities Exchange Act of 1934. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 33, 35 (1991) (citing cases).

If a court grants a motion to compel arbitration, pursuant to the FAA the court must stay the proceedings pending arbitration. 9 U.S.C. § 3. "[T]he FAA ... does not 'limit the court's authority to grant a dismissal,' " however, when a court requires arbitration with respect to all claims. *Quevedo v. Macy's Inc.*, 798 F. Supp. 2d 1122, 1143 (C.D. Cal. 2011) (quoting *Sparling v. Hoffman Constr. Co.*, 864 F.2d 634, 638 (9th Cir. 1988). Although this case was transferred from a district court in the Second Circuit, this court applies Ninth Circuit law in reviewing the federal claims. *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) ("[W]hen reviewing

federal claims, a transferee court in this circuit is bound only by our circuit's precedent.").

B. Parties' Arguments

EY argues that its Dispute Resolution Program is a valid agreement to arbitrate based on the employees' express acceptance (McDaniel's signed offer letter) or implied acceptance (Morrison's continued employment after the program was instituted) of its terms. *See Shah v. Wilco Sys., Inc.*, 806 N.Y.S. 2d 553, 557 (N.Y. App. Div. 2005) (Under New York law, an "[at will] employee's continued employment is deemed to be a consent" to changes in employment terms.).[1] Further, EY argues that its Dispute Resolution Program encompasses the claims at issue here. According to EY, because the Arbitration Agreement is valid and encompasses the claims at issue, "there is 'no place for exercise of discretion,' and the [c]ourt must 'direct the parties to proceed in arbitration.'" Defs.' Br. 5, Dkt. No. 42 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)).

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[1] Defendants cite New York law because the Arbitration Agreement provides that New York law governs any dispute arising under the arbitration "Program" where the FAA is "held not to apply." However, to the extent California law applies to the determination of *whether* the employees actually *agreed to be bound* by EY's Arbitration Agreement, California law also deems an at will employee's continued employment after notification of an arbitration program an agreement to be bound by the terms of the arbitration program. *See Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 419-21 (2000) (holding that, where employee received notification of employer's arbitration program through two mailings and continued working, her continued employment constituted an agreement to be bound by the arbitration program).

Plaintiffs counter that the EY Arbitration Agreement is unenforceable because: (1) it does not provide for mandatory shifting of costs and expenses, as required by the FLSA; (2) even if the Agreement preserves plaintiffs' rights to fee shifting, the cost of proceeding individually is prohibitively expensive such that arbitration would not allow the plaintiffs to "effectively vindicat[e] [their] statutory rights," *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 549-50 (S.D.N.Y. 2011) ("*Sutherland I*") and *Sutherland v. Ernst & Young LLP*, 857 F. Supp. 2d 528, 533, 536-38 (S.D.N.Y. 2012) ("*Sutherland II* "); (3) EY waived its right to compel arbitration based on its litigation conduct in this case and in a related case where Morris was a class member; (4) the class and collective action waiver terms in the Arbitration Agreement conflict with the statutory right to collective action in the FLSA; and (5) those same terms violate Sections 7 and 8 of the National Labor Relations Act ("NLRA"), as decided in *D.R. Horton, Inc. v. N.L.R.B.*, No. 12-ca-25764, 357 NLRB No. 184 (Jan. 3, 2012). The court addresses each of plaintiff's arguments in turn.

C. Mandatory Fee-Shifting Under the FLSA

The FLSA provides that "[t]he court . . . shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 26 U.S.C. § 216(b). Plaintiffs argue that § 216(b) mandates fee shifting for employees who successfully sue for violation of the Act. Because the Arbitration Agreement does not provide for this "mandatory" fee shifting, plaintiffs argue that it violates the FLSA, and is therefore unenforceable.

Section 216(b) does not require an arbitration agreement to affirmatively mandate fee shifting. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000) (holding that an arbitration agreement that did not mention arbitration costs and fees was not *per se* unenforceable where plaintiff presented no evidence as to the likelihood that she would incur prohibitive costs in arbitration). Plaintiffs cite *McBurnie v. City of Prescott*, No. 09-8139, 2010 WL 5344927 (D. Ariz. Dec. 22, 2010), to support the proposition that fee-shifting is mandatory under the FLSA. While *McBurnie* does emphasize that shifting attorney's fees for prevailing plaintiffs is mandatory and nonwaivable under the FLSA, the court did not hold that an arbitration agreement must affirmatively require mandatory fee shifting in order to be enforceable. *Id.* at *2-3. For example, where the parties stipulate to fee shifting or where the agreement gives the arbitrator the power to shift fees in accordance with applicable laws, there may be no violation of § 216(b). *See Sutherland II*, 847 F. Supp. 2d at 532 n.1.

In *Sutherland II*, although "the [Arbitration] Agreement appear[ed] to prevent shifting of costs or expenses on behalf of a prevailing plaintiff," EY's stipulations in that case (to shift fees and costs to EY if the employee prevailed) addressed these "most obvious obstacles to Sutherland's vindication of her claims." *Id.* In *Sutherland II*, the court found EY's Arbitration Agreement unenforceable not on the basis of the lack of a fee shifting provision, but rather on the basis that the Arbitration Agreement's waiver of collective action made arbitration prohibitively expensive for the employee in that case to vindicate her statutory rights. *Id.* at 533, 536-38; *see* Part II.D *infra*.

In this case, EY has made the same stipulations as in *Sutherland II*. Defs.' Mot. 2; *Sutherland II*, 847 F. Supp. 2d at 532 n.1. Specifically, EY "stipulates that plaintiffs are entitled to recover in arbitration any fees and costs that they could recover in court if they prevail on their individual claims" and "that [EY] will bear all administrative costs and arbitrator fees." Defs.' Mot. 2. Further, EY's Arbitration Agreement allows fee shifting "in accordance with the law," Arbitration Agreement ¶ IV.P.3, and both the FLSA and California law provide for recovery of attorney's fees as a matter of right for prevailing plaintiffs. In light of EY's express stipulations and the terms of the Arbitration Agreement expressly permitting plaintiffs to recover attorney's fees "in accordance with the law," plaintiffs' fee-shifting rights are adequately protected even if arbitration is compelled.

D. Whether Arbitration is Prohibitively Expensive

Plaintiffs argue that, like in *Sutherland*, even if the costs of arbitration could be shifted, the waiver of the ability to proceed in a collective action set forth in the Arbitration Agreement effectively makes individual arbitration prohibitively expensive for the plaintiffs to enforce their statutory rights. Based on EY's express stipulations, EY counters that "plaintiffs have the potential to be *fully compensated* for the costs of bringing suit." Reply 16 (underline in brief). Thus, EY contends that there are no costs "unique to arbitration whatsoever, let alone costs that could render arbitration prohibitively expensive." Reply 10. EY urges the court not to follow *Sutherland*'s application of the prohibitive costs doctrine because the Ninth Circuit has rejected that court's cost-benefit approach. *Id.* at 14.

"[W]here [a] party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *Green Tree*, 531 U.S. at 92.[2] Thus, courts generally hold that a party opposing arbitration "must provide some *individualized evidence* that it likely will face prohibitive costs in the arbitration at issue *and* that it is financially incapable of meeting those costs." *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (citing *Bradford v. Rockwell Semiconductors Sys., Inc.*, 238 F.3d 549, 557 (4th Cir. 2001)) (emphases added). While *Green Tree* recognized that "the existence of large arbitration costs may well preclude a litigant . . . from effectively vindicating" her statutory rights, it explicitly did not address "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence." *Green Tree*, 531 U.S. at 91-92 (not reaching this issue because there was no evidence whatsoever of any prohibitive costs, and "[t]he 'risk' that [petitioner] w[ould] be saddled with prohibitive costs [wa]s too speculative to justify the invalidation of an arbitration agreement").

Plaintiffs cite *Sutherland I*, where the court found EY's Arbitration Agreement unenforceable where the cost of prosecuting an individual claim was prohibitive relative to that individual's potential recovery. *See Suth-*

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[2] The "prohibitive costs" doctrine from *Greem Tree* is "limited to federal statutory rights." *Coneff*, 673 F.3d at 1159 n.2 ("*Mitsubishi, Gilmer, Green Tree* and similar decisions are limited to federal statutory rights."). Thus, the court's analysis of the applicability of *Green Tree* to the present case does not apply to plaintiffs' California Labor Code claims.

erland I, 768 F. Supp. 2d at 551. But both *Sutherland I* and *II* relied on the Second Circuit's prohibitive costs doctrine set forth in the *American Express* rulings: *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009) (*Amex I*); *In re American Express Merchants' Litigation*, 634 F.3d 187, 199 (2d Cir. 2011) (*Amex II*) (reconsideration of *Amex I* on remand from the Supreme Court); and *In re American Express Merchants' Litigation*, 681 F.3d 139 (2d Cir. 2012) (*Amex III*) (sua sponte reconsideration of *Amex II* in view of *AT&T Mobility LLC v. Concepcion*). In these rulings, the Second Circuit held that the class action waiver in plaintiffs' arbitration agreement was unenforceable because individual arbitration proceedings were prohibitively expensive and thus plaintiffs were entitled to class proceedings to effectively vindicate their statutory rights. The Supreme Court granted certiorari and reversed the Second Circuit's holding under the prohibitive costs doctrine *sub nom American Express Co. v. Italian Colors Restaurant*, ___ S. Ct. ___, 2013 WL 3064410, at *7 (June 20, 2013) (*Amex IV*). In *Amex IV*, the Supreme Court held that there is "no entitlement to class proceedings for the vindication of statutory rights." *Id.* at *4.

The Ninth Circuit has also rejected the Second Circuit's approach to the prohibitive costs doctrine. *See Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) ("To the extent that the Second Circuit's opinion is not distinguishable, we disagree with it ...."); *see also Amex III*, 681 F.3d 139, 144 (2d Cir. 2012) (Jacobs, J., dissenting) (observing that the *Amex III* majority diverged from the Ninth Circuit's holding in *Coneff*); *Jasso v. Money Mart Exp., Inc.*, 879 F. Supp. 2d 1038, 1046 (N.D. Cal. 2012) ("[T]o the extent that *Amex II*' s holding rested on the principle that a class waiver should be

unenforceable where the amounts at issue in the claims and the expense of prosecuting the claims would effectively preclude vindication of statutory rights . . . that argument has been soundly rejected by the Ninth Circuit's subsequent decision in *Coneff* . . . .").

In *Coneff*, the Ninth Circuit rejected the argument that "[small-dollar] claims . . . cannot be vindicated effectively [in arbitration] because they are worth much less than the cost of litigating them." 673 F.3d at 1158-59. The Ninth Circuit held that although it may be true that these types of "small-dollar claims" do not implicate sufficient incentives to vindicate plaintiffs' rights in arbitration—as opposed to "effective means" of doing so, i.e., through class actions—"[s]uch unrelated policy concerns, however worthwhile, cannot undermine the FAA." *Id.* at 1159.[3] The Supreme Court's recent ruling in Amex IV affirms the Ninth Circuit's approach. The Supreme Court explained that "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Amex IV*, ___ S. Ct. ___, 2013 WL 3064410, at *5.

Plaintiffs' arguments here are primarily based on evidence indicating that the costs of arbitration including

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[3] Although *Coneff* primarily address state law unconscionability defenses to the enforcement of an arbitration agreement, the court also held that the plaintiff's federal claim failed to meet the requirements under *Green Tree* to invalidate the arbitration agreement on the basis that it was prohibitively expensive. 673 F.3d at 1159 n.2 ("[B]ecause Plaintiffs raise at least one federal claim in their complaint, we decide the case with *Green Tree* in mind; Plaintiffs' federal claim fails under *Green Tree*.").

the attorney's fees end expert witness fees are much smaller in a class action lawsuit as compared to potential individual recovery in arbitration. *See* Opp'n 20. But these are precisely the arguments that the Supreme Court rejected in *Amex IV* and the Ninth Circuit rejected in *Coneff*. ___ S. Ct. ___, 2013 WL 3064410, at *5; 673 F.3d at 1159. Plaintiffs' arguments here also fail under the Supreme Court's broad language in *Concepcion* holding that: "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748. Absent a clear statement in a federal statute demonstrating Congressional intent to override the use of arbitration, the FAA prevails. *Jasso*, 879 F. Supp. 2d at 1045 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012)).

The court in *Kaltwasser v. AT&T Mobility LLC* explained that the effective vindication of statutory rights doctrine (referred to as "Green Tree") may still be applicable in limited situations:

> If *Green Tree* has any continuing applicability [after *Concepcion*], it must be confined to circumstances in which a plaintiff argues that *costs specific to the arbitration process, such as filing fees and arbitrator's fees, prevent her from vindicating her claims*. *See Green Tree*, 531 U.S. at 90-91 & n.6, 121 S. Ct. 513. *Concepcion* forecloses plaintiffs from objecting to class-action waivers in arbitration agreements on the basis that the potential cost of proving a claim exceed potential individual damages.

812 F. Supp. 2d 1042, 1050 (N.D. Cal. 2011) (emphasis added); *Accord Amex IV*, ___ S. Ct. ___, 2013 WL 3064410, at *5 ("The 'effective vindication' exception . . . would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover *filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.*" (citing *Green Tree*, 531 U.S. at 90) (emphasis added)).

No prohibitively expensive costs "specific to the arbitration process, such as filing fees and arbitrator's fees," exist here. Here, EY expressly stipulated in its motion: (1) "that plaintiffs are entitled to recover in arbitration any fees and costs that they could recover in court if they prevail on their individual claims"; and (2) "that it [EY] will bear all administrative costs and arbitrator fees." Defs.' Br. 2. In its Reply brief, EY further stipulates "that should the plaintiffs prevail, they may recover any expert fees reasonably necessary to prosecute their individual claims, up to the $33,500 estimated by the proposed expert." Reply 13. EY's stipulations essentially eliminate any additional "costs specific to the arbitration process" that would render arbitration prohibitively expensive and that plaintiffs would not otherwise incur in litigation. *See Kaltwasser*, 812 F. Supp. 2d at 1049-50.

Morris provided an affidavit declaring his financial inability to pursue his claim in an individual arbitration. However, the court does not find plaintiffs' financial means, or lack thereof, to be outcome-determinative. Even if Morris were able to finance the arbitration costs, he retains no right to fee shifting if his statutory claims *fail*. *See* Part II.C *supra*. By seeking to invalidate the Arbitration Agreement's collective action waiver, the

plaintiff is essentially seeking a "risk of loss" premium. "[I]t is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake." *Kaltwasser*, 813 F. Supp. 2d at 1049; *see also Amex IV*, ___ S. Ct. ___, 2013 WL 3064410, at *7 ("The regimen established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. . . . The FAA does not sanction such a judicially created superstructure.").

In sum, plaintiffs fail to meet *Green Tree*'s burden of demonstrating that their statutory rights cannot be effectively vindicated through arbitration based solely on the risk of loss argument.

E. Waiver

Plaintiffs argue, relying primarily on *Van Ness Townhouses v. Mar Industries Corp.*, 862 F.2d 754 (9th Cir. 1989), that EY waived the right to arbitrate by pursuing and actively litigating their claims in state or federal court. According to plaintiffs, EY's actions in this case (transferring the action to this district) and in the *Ho* related cases (where Morris and McDaniel were putative class members) support a finding that EY waived its right to compel arbitration.

EY counters that "[i]t is well established that first moving to transfer an action does not relinquish a party's

right to compel arbitration." Reply 4 (citing *Gonsalves v. Infosys Techs., Ltd.*, 2010 WL 3118861, at *3 n.2 (N.D. Cal. Aug. 5, 2010) ("The California Supreme Court has held that '[a] petitioning party does not waive its arbitration rights merely by seeking to change judicial venue of an action prior to requesting arbitration. . . . [A] party is not required to litigate the issue of arbitration in an improper or inconvenient venue.'" (quoting *St. Agnes Med. Ctr. v. PacifiCare of Cal.*, 31 Cal. 4th 1187, 1205 (2003)). EY also argues that there is no waiver of the right to compel arbitration based on an action where Morris and McDaniel were not parties. EY contends that the court's determination of waiver in *Ho* cannot be binding here because the waiver ruling in *Ho* "turned on facts that were unique to the parties asserting a waiver in that case," primarily prejudice to plaintiffs Ho and Fernandez. Reply 7. Moreover, EY argues that the plaintiffs in this case cannot establish prejudice.

"A party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 693, 694 (9th Cir. 1986). "Any examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements." *Id.* "The *Fisher* test applies to both express and implied waiver." *Van Ness*, 862 F.2d at 758.

Plaintiffs fail to meet the "heavy burden" required to prove waiver of the contractual right to arbitrate. *See Fisher*, 791 F.2d at 694. First, this court agrees that the

decision in *Ho* is not binding here because that case turned on whether those particular plaintiffs, Ho and Fernandez, were prejudiced. *Ho*, 2011 WL 4403625, at *6 ("[T]he prejudice to plaintiffs in this case goes well beyond the expenditure and duplication of effort claimed by the plaintiffs in *Fisher*. The parties' substantive rights have been affected."). Because no similar prejudice applies to Morris, the issues are not identical. *See Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995), as amended 75 F.3d 1391 (1996) (no collateral estoppel where issues are not identical). The court also agrees that neither Morris nor McDaniel, as putative class members, were parties to the *Ho* related cases litigation such that waiver applied to them. *See Mora v. Harley-Davidson Credit Corp.*, 2012 WL 1189769, at * 15 (E.D. Cal. Apr. 9, 2012) ("[U]ntil a class is certified and the opt-out period has expired, unnamed Class members are not parties to this action, and their claims are not at issue."); *Laguna v. Coverall North Am. Inc.*, 2011 WL 3176469, at *8 (S.D. Cal. July 26, 2011) (same). Plaintiffs cite no conduct by EY during the *Ho* litigation that evidences actions inconsistent with its intent to enforce arbitration with respect to Morris. Indeed, when Morris attempted to intervene in *Ho*, EY opposed plaintiff's motion to add Morris on the grounds that the motion was "futile, because if the [c]ourt granted it, [EY] *would move to compel Morris to arbitrate his claims.*" Defs.' Opp. to Mot. to Add a New Representative 19, *Ho*, No. 05-4867, Dkt. No. 316 (emphasis added). The court's waiver decision with respect to Ho and Fernandez—which the court rendered prior to Morris's motion to intervene in that case—simply has no bearing on EY's right to arbitrate with respect to Morris.

Second, the court agrees with EY that its motion to transfer does not waive its right to compel arbitration, especially here were EY voiced its intent to move to compel arbitration in the transfer motion itself. *See* Transfer Mot., Dkt. No. 25 at 2 n.1. EY also put Morris on notice of its intent to compel arbitration in its answer to Morris's complaint. Dkt. 30 at 19. Plaintiffs rely on cases from other circuits where courts have held that defendants waived their arbitration rights based on their own filing of a lawsuit or their removal of a lawsuit to federal court. Opp'n 11 (citing Fifth Circuit and Seventh Circuit cases). Plaintiffs also cite *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 1753784, at *3 (N.D. Cal. May 9, 2011), where the court held that "multiple motions to dismiss" and failure to "raise the arbitration clauses in their joint opposition to class certification," waived any right to arbitration. These cases, however, are inapposite to the facts here, where EY consistently acted with the intent to compel arbitration as soon as Morris filed suit, and where EY has not filed any case dispositive motions.

Third, plaintiffs here have not demonstrated prejudice. In *Ho*, the court found that the parties suffered substantial prejudice because their "substantive rights ha[d] been affected—[EY] obtained summary judgment against Ho, and it was able to flesh out its 'poor employee' defense against Fernandez in the summary judgment motion it brought against her" which led the court to "conclud[e] that Fernandez is not an appropriate class representative." *Ho*, 2011 WL 4403625, at *6. In *Van Ness*, the appellate court held that the defendant "implicitly waived arbitration under the third prong of the *Fisher* test because the appellants were prejudiced by [defendant's] inconsistent acts," including "litigat[ing]

actively the entire matter—including pleadings, motions, and approving a pre-trial conference order" without "mov[ing] to compel arbitration until more than two years after the appellants brought the action." *Van Ness*, 862 F.2d at 759. In contrast to *Ho* and *Van Ness*, the instant action has been pending for less than a year, and plaintiffs only generally allege prejudice based on having to respond to EY's transfer motion and incurring litigation costs. EY has not served any discovery requests or made any motions as to the merits of plaintiffs' claims. In *Fisher*, under circumstances far more compelling than these with respect to a showing of prejudice, the Ninth Circuit held that the plaintiff failed to establish prejudice after investing "time, money, and effort" in responding to pretrial motions, preparing for trial, and conducting "extensive discovery" during three and a half years of litigation. 791 F.2d at 697. Plaintiffs cannot claim prejudice based on their own choice to sue in federal court, in violation of the Arbitration Agreement. *See id.* at 698 ("Any extra expense incurred as a result of the [plaintiffs'] deliberate choice of an improper forum . . . cannot be charged to [the defendant]."). Any such prejudice is "self inflicted," and EY has a right to seek transfer to move to compel arbitration in the proper forum. *See id.*

Accordingly, the court holds that EY did not waive its right to compel arbitration with respect to Morris.

F. Right to Collective Action Under the FLSA

Plaintiffs also attempt to rely on the FLSA's provision providing for collective action, 29 U.S.C. § 216(b), to argue that such a right is "substantive and not waivable in an arbitration agreement." Opp'n 25 (citing *Raniere v. Citigroup Inc.*, 827 F. Supp. 2d 294, 311 (S.D.N.Y. 2011)).

Section 216(b) provides that "[a]n action to recover the liability prescribed in [the Act] may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."

Under Supreme Court precedent, courts must "enforce agreements to arbitrate according to their terms," "unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 132 S. Ct. at 669. Plaintiffs depend on *Raniere* for the proposition that Congress intended the right to collective action under the FLSA to be nonwaivable. In that case, plaintiffs sought certification as a class in a suit for overtime wages and liquidated damages under the FLSA and the New York labor law. 827 F. Supp. 2d at 299. The *Raniere* court found that the legislative history of the FLSA evidenced congressional intent to for employees to have a nonwaivable right to collective action. *Id.* at 314 (citing legislative history indicating Congress's desire to "reduce[ ] the burden borne by the public fisc," 83 Cong. Rec. 9264, and to promote "uniformity with regard to the application of FLSA standards," H. Rep. No. 2182, 75th Cong., 3d Sess. at 6-7). The *Raniere* court held that a waiver of class action is thus "unenforceable as a matter of law" because, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute [at issue].'" *Id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Despite *Raniere*'s analysis, every circuit court that has addressed the issue has held the opposite: that arbitration agreements *can* validly waive collective action because Congress did *not* intend to confer a nonwaivable

right to a class action under the FLSA. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052 (8th Cir. Jan. 7, 2013) ("[T]he FLSA contains no 'contrary congressional command' as required to override the FAA."); *Carter v. Countrywide Credit Indus. Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) ("[W]e reject the Carter Appellants' claim that their inability to proceed collectively deprives them of substantive rights available under the FLSA."); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) ("[T]here is no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute."); *Horenstein v. Mortgage Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001) (same); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (holding that waiver of collective action in arbitration agreement was not unconscionable).

In *Gilmer*, the Supreme Court considered whether Congress intended to preclude a waiver of judicial resolution of claims brought under the Age Discrimination in Employment Act of 1967 ("ADEA"). 500 U.S. at 26-27. The Court rejected the plaintiff's argument that judicial enforcement of the ADEA was a nonwaivable right because, although the ADEA provided for a judicial forum, it "did not explicitly preclude arbitration or other nonjudicial resolution of claims." *Id.* at 29. Plaintiff specifically argued in *Gilmer* that the arbitration agreement there was inadequate under the ADEA because, *inter alia*, "arbitration procedures . . . do not provide for broad equitable relief and class actions." *Id.* at 32. Although the arbitral forum at issue in *Gilmer* (the New York Stock Exchange arbitration forum) actually did provide for collective proceedings, the Court nevertheless held: "'[E]ven if the arbitration could not go forward as a class

action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Id.* (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting). The Court emphasized that "although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id.* at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

The court finds the Supreme Court's reasoning in *Gilmer* equally applicable to the FLSA. Indeed, the ADEA expressly adopts the collective action procedures of the FLSA, 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b); *Carter*, 362 F.3d at 298. The court here agrees with the various circuits concluding that nothing in the legislative history of the FLSA indicates Congressional intent to preclude arbitration of FSLA claims. As the Ninth Circuit found in *Horenstein*, "there is nothing in the text [of the FLSA], and plaintiffs have shown nothing in the legislative history, indicating that Congress intended to preclude arbitration of FLSA claims." 9 F. App'x at 619. The court disagrees with *Raniere* that the right to collective action under the FLSA is a substantive right. *Accord id.* ("Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute."). The court holds that Congress did not intend collective actions to be a substantive right under the FLSA, and that such a right may be waived as a part of a valid arbitration agreement.

G. Right to Collective Action Under Sections 7 and 8 of the NLRA

Plaintiffs also relies on the National Labor Relations Board's ("NLRB") decision in *D.R. Horton*, 357 N.L.R.B. No. 184 (2012), for the proposition that right to collective action is also nonwaivable under Sections 7 and 8 of the NLRA. In *D.R. Horton*, the NLRB determined that "an agreement that precludes [employees] from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial . . . unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the [FAA], which generally makes employment-related arbitration agreements judicially enforceable." 357 NLRB No. 184 at 1. Both the Eighth Circuit and at least one district court in this circuit, however, have rejected the NLRB's interpretation of the NLRA on the grounds that it is inconsistent with the Supreme Court's interpretation of the FAA. *Owen*, 702 F.3d at 1054 (declining to defer to the NLRB's interpretation of Supreme Court precedent); *Jasso*, 879 F. Supp. 2d at 1047 ("[T]here is no language in the NLRA . . . demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA.").

In *Jasso*, the court held that "[b]ecause Congress did not expressly provide [in the NLRA] that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms." 879 F. Supp. 2d at 1048. The court reasoned that "the broad language in *Concepcion* . . . articulates a strong policy choice in favor of enforcing arbitra-

tion agreements and thereupon holds that class waiver provisions should not be stricken or render the agreements unenforceable." *Id.* Here, the court declines to defer to the NLRB's interpretation of the NLRA in *D.R. Horton* because, although the NLRB is charged with interpreting the NLRA, it is *not* charged with interpreting the FAA. When an NLRB decision "trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 147 (2002). "[C]ourts do not owe deference to an agency's interpretation of a statute it is not charged with administering or when an agency resolves a conflict between its statute and another statute." *Ass'n of Civilian Technicians, Silver Barons Chapter v. Fed. Labor Relations Auth.*, 200 F.3d 590, 592 (9th Cir. 2000). Based on "the strong policy favoring arbitration [whereby] doubts are to be resolved in favor of the party moving to compel arbitration," *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983), the court declines to defer to the NLRB's decision in *D.R. Horton*.

III. ORDER

For the foregoing reasons, the court **GRANTS** EY's motion to compel arbitration. At oral argument, the parties agreed that if the court grants the motion to compel arbitration the case should be dismissed. Because arbitration is required for every claim, the court dismisses, rather than stays, the case. *See Sparling*, 864 F.2d at 638.

Dated: July 9, 2013

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA
SAN JOSE DIVISION

No. 12-04964-RMW

STEPHEN MORRIS and KELLY MCDANIEL, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

ERNST & YOUNG LLP, and
ERNST & YOUNG U.S., LLP, Defendants.

Filed: July 23, 2013

On July 9, 2013, the court granted defendants Ernst & Young and Ernst & Young U.S., LLP's (collectively "Ernst & Young") motion to dismiss and compel arbitration. Order, Dkt. No. 63. Accordingly, the court enters judgment in favor of Ernst & Young and against plaintiffs. Plaintiffs shall take nothing by way of their complaint.

Dated: July 23, 2013

/s/ Ronald M. Whyte
RONALD M. WHYTE
United States District Judge